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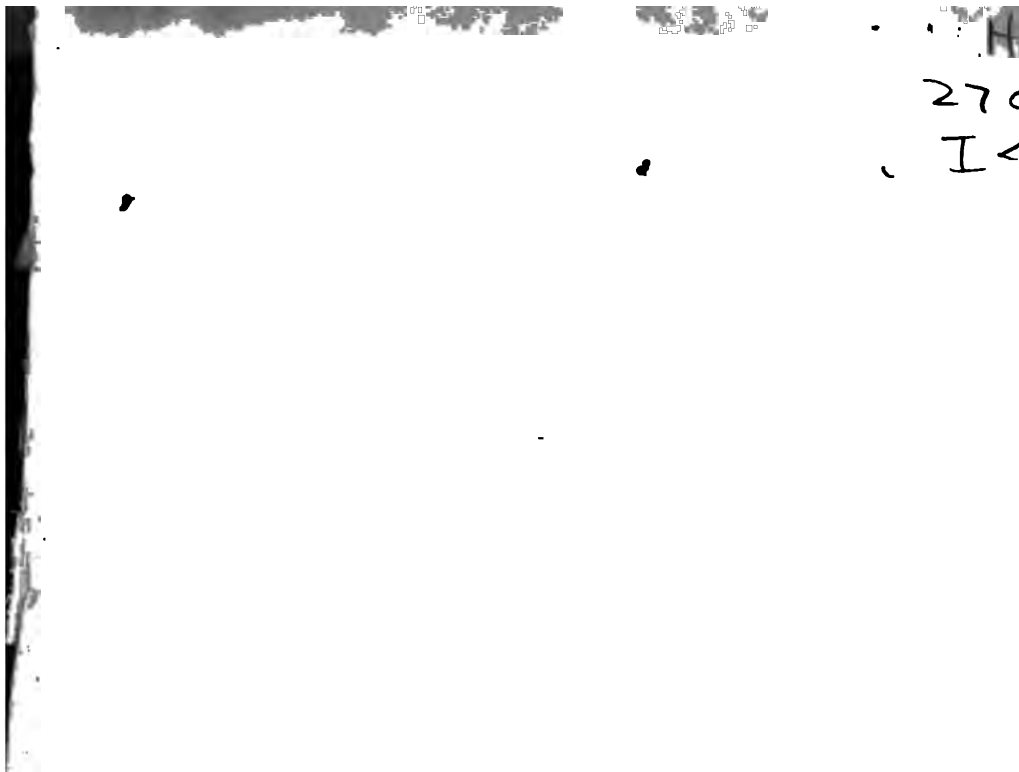
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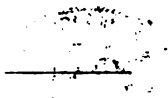






INTERSTATE COMMERCE REPORTS.

VOLUME X.



DECISIONS

OF THE

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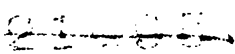
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TABLE OF CASES REPORTED.

Aberdeen Commercial Association <i>v.</i> Mobile & Ohio Railroad Company	289
Alabama & Vicksburg Railway Company <i>et al.</i> , Central Yellow Pine Association <i>v.</i>	505
Alabama Great Southern Railroad Company <i>et al.</i> , Central Yellow Pine Association <i>v.</i>	505
Alleged Unlawful Rates & Practices in the Transportation of Coal & Mine Supplies by the Atchison, Topeka, & Santa Fé Railway Company, <i>Re</i>	473
Allowances to Elevators, <i>Re</i>	309
Armour & Company, Interveners in Consolidated Forwarding Company <i>v.</i> Southern Pacific Company <i>et al.</i>	590
Armour & Company, Interveners in Southern California Fruit Exchange <i>v.</i> Southern Pacific Company <i>et al.</i>	590
Atchison, Topeka & Santa Fé Railway Company, <i>Re</i>	473
Atchison, Topeka & Santa Fé Railway Company <i>et al.</i> , Cattle Raisers' Association of Texas <i>v.</i>	83
Atchison, Topeka & Santa Fé Railway Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
Atchison, Topeka & Santa Fé Railway Company <i>et al.</i> , Consolidated Forwarding Company <i>v.</i>	590
Atchison, Topeka & Santa Fé Railway Company <i>et al.</i> , H. B. Pitts & Son <i>v.</i>	691
Atchison, Topeka & Santa Fé Railway Company <i>et al.</i> , Lehman-Higginson Grocer Company <i>v.</i>	460
Atchison, Topeka & Santa Fé Railway Company <i>et al.</i> , Southern California Fruit Exchange <i>v.</i>	590
Atlantic Coast Line Railroad Company <i>et al.</i> , A. G. Swaffield <i>v.</i>	281
Atlantic Coast Line Railroad Company <i>et al.</i> , Georgia Peach Growers' Association <i>v.</i>	255

	PAGE
Atlantic Coast Line Railroad Company, <i>H. H. Tift v.</i>	548
Atlantic Coast Line Railroad Company <i>et al.</i> , <i>Wm. Wrigley, Jr., v.</i>	412
Baltimore & Ohio Railroad Company <i>et al.</i> , <i>Chamber of Commerce of Chattanooga v.</i>	111
Baltimore & Ohio Railroad Company, <i>Glade Coal Company v.</i>	226
Baltimore & Ohio Southwestern Railroad Company <i>et al.</i> , <i>Cincinnati Chamber of Commerce and Merchants' Exchange v.</i>	378
Barrow, C. M., <i>v. Yazoo & Mississippi Valley Railroad Company et al.</i>	333
Blackman, John W., Jr., <i>v. Columbia, Newberry & Laurens Railroad Company</i>	352
Blackman, John W., Jr., <i>v. Southern Railway Company.</i>	352
Burlington, Cedar Rapids & Northern Railway Company <i>et al.</i> , <i>Chicago Live Stock Exchange v.</i>	428
Cannon Falls Farmers' Elevator Company <i>v. Chicago Great Western Railway Company et al.</i>	650
Cattle Raisers' Association of Texas <i>v. Chicago, Burlington & Quincy Railroad Company et al.</i>	83
Central of Georgia Railway Company <i>et al.</i> , <i>Chamber of Commerce of Chattanooga v.</i>	111
Central of Georgia Railway Company <i>et al.</i> , <i>H. H. Tift v.</i>	548
Central of Georgia Railway Company <i>et al.</i> , <i>Wm. Wrigley, Jr., v.</i>	412
Central Railroad Company of New Jersey <i>et al.</i> , <i>Mershon, Schuette, Parker & Company v.</i>	456
Central Yellow Pine Association <i>v. Illinois Central Railroad Company et al.</i>	505
Central Yellow Pine Association <i>v. Vicksburg, Shreveport, & Pacific Railroad Company et al.</i>	193
Chamber of Commerce of Chattanooga <i>v. Southern Railway Company et al.</i>	111
Chesapeake & Ohio Railway Company <i>et al.</i> , <i>Chamber of Commerce of Chattanooga v.</i>	111

	PAGE
Chesapeake & Ohio Railway Company <i>et al.</i> , Cincinnati Chamber of Commerce and Merchants' Exchange <i>v.</i>	378
Chesapeake & Ohio Railway Company <i>et al.</i> , Wm. Wrigley, Jr., <i>v.</i>	412
Chicago & Alton Railroad Company <i>et al.</i> , Cattle Raisers' Association of Texas <i>v.</i>	83
Chicago & Alton Railway Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
Chicago & Eastern Illinois Railroad Company <i>et al.</i> , Wm. Wrigley, Jr., <i>v.</i>	412
Chicago & Northwestern Railway Company <i>et al.</i> , Cattle Raisers' Association of Texas <i>v.</i>	83
Chicago & Northwestern Railway Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
Chicago, Burlington & Quincy Railroad Company <i>et al.</i> , Cattle Raisers' Association of Texas <i>v.</i>	83
Chicago, Burlington & Quincy Railroad Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
Chicago Great Western Railway Company <i>et al.</i> , Cannon Falls Farmers' Elevator Company <i>v.</i>	650
Chicago Great Western Railway Company <i>et al.</i> , Cattle Raisers' Association of Texas <i>v.</i>	83
Chicago Great Western Railway Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
Chicago, Indianapolis & Louisville Railway Company, G. C. Pratt Lumber Company <i>v.</i>	29
Chicago, Indianapolis & Louisville Railway Company <i>et al.</i> , Wm. Wrigley, Jr., <i>v.</i>	412
Chicago Live Stock Exchange <i>v.</i> Chicago Great Western Railway Company <i>et al.</i>	428
Chicago Live Stock Exchange, Intervener in Cattle Raisers' Association <i>v.</i> Chicago, Burlington & Quincy Railroad Company	83
Chicago, Milwaukee & St. Paul Railway Company <i>et al.</i> , Cannon Falls Farmers' Elevator Company <i>v.</i>	650
Chicago, Milwaukee & St. Paul Railway Company <i>et al.</i> , Cattle Raisers' Association of Texas <i>v.</i>	83
Chicago, Milwaukee & St. Paul Railway Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428

	PAGE
Chicago, Milwaukee & St. Paul Railway Company <i>et al.</i> , Duluth Shingle Company <i>v.</i>	489
Chicago, Rock Island & Pacific Railway Company <i>et al.</i> , Cattle Raisers' Association of Texas <i>v.</i>	83
Chicago, Rock Island & Pacific Railway Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
Chicago, Rock Island & Pacific Railway Company, Leh- man-Higginson Grocer Company <i>v.</i>	460
Chicago, St. Paul, Minneapolis & Omaha Railway Com- pany <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
Chicago, St. Paul, Minneapolis & Omaha Railway Com- pany <i>et al.</i> , Duluth Shingle Company <i>v.</i>	489
Cincinnati & Muskingum Valley Railroad Company <i>et al.</i> , Cincinnati Chamber of Commerce and Merchants' Exchange <i>v.</i>	378
Cincinnati & Muskingum Valley Railroad Company, John H. Parks <i>v.</i>	47
Cincinnati & Westwood Railroad Company <i>et al.</i> , Cincin- nati Chamber of Commerce and Merchants' Exchange <i>v.</i>	378
Cincinnati Chamber, of Commerce and Merchants' Ex- change <i>v.</i> Baltimore & Ohio Southwestern Railroad Company <i>et al.</i>	378
Cincinnati, Georgetown & Portsmouth Railroad Company <i>et al.</i> , Cincinnati Chamber of Commerce and Mer- chants' Exchange <i>v.</i>	378
Cincinnati, Hamilton & Dayton Railway Company <i>et al.</i> , Cincinnati Chamber of Commerce and Merchants' Ex- change <i>v.</i>	378
Cincinnati, Lebanon & Northern Railway Company <i>et al.</i> , Cincinnati Chamber of Commerce and Merchants' Ex- change <i>v.</i>	378
Cincinnati, New Orleans & Texas Pacific Railway Com- pany <i>et al.</i> , Central Yellow Pine Association <i>v.</i>	505
Cincinnati, New Orleans & Texas Pacific Railway Com- pany <i>et al.</i> , Chamber of Commerce of Chattanooga <i>v.</i>	111
Cincinnati, New Orleans & Texas Pacific Railway Com- pany <i>et al.</i> , Cincinnati Chamber of Commerce and Merchants' Exchange <i>v.</i>	378

	PAGE
Cincinnati Northern Railroad Company <i>et al.</i> , Cincinnati Chamber of Commerce and Merchants' Exchange <i>v.</i>	378
Cincinnati Northwestern Railway Company <i>et al.</i> , Cincinnati Chamber of Commerce and Merchants' Exchange <i>v.</i>	378
Cist, Charles M., <i>v.</i> Michigan Central Railroad Company	217
Cleveland, Cincinnati, Chicago & St. Louis Railway Company <i>et al.</i> , Cincinnati Chamber of Commerce and Merchants' Exchange <i>v.</i>	378
Cleveland, Cincinnati, Chicago & St. Louis Railway Company <i>et al.</i> , Wm. Wrigley, Jr., <i>v.</i>	412
Clyde Steamship Company <i>et al.</i> , Chamber of Commerce of Chattanooga <i>v.</i>	111
Columbia, Newberry & Laurens Railroad Company, John W. Blackman, Jr., <i>v.</i>	352
Consolidated Forwarding Company <i>v.</i> Southern Pacific Company <i>et al.</i>	590
Continental Fruit Express Company, Interveners in Consolidated Forwarding Company <i>v.</i> Southern Pacific Company <i>et al.</i>	590
Continental Fruit Express Company, Interveners in Southern California Fruit Exchange <i>v.</i> Southern Pacific Company <i>et al.</i>	590
Cowart-Lofton Company, Intervener in Wm. Wrigley, Jr., <i>v.</i> Cleveland, Cincinnati, Chicago & St. Louis Railway Company <i>et al.</i>	412
Davies, Edward G., <i>v.</i> Pere Marquette Railroad Company <i>et al.</i>	405
Denison Light & Power Company <i>v.</i> Missouri, Kansas & Texas Railway Company	337
Detroit Southern Railroad Company, Paxton Tie Company <i>v.</i>	422
Divisions of Joint Rates, <i>Re</i>	385
Divisions of Joint Rates, <i>Re</i>	651
Duluth Shingle Company <i>v.</i> Duluth, South Shore & Atlantic Railway Company <i>et al.</i>	489
Duluth, South Shore & Atlantic Railway Company <i>et al.</i> , Duluth Shingle Company <i>v.</i>	489

	PAGE
Erie Railroad Company <i>et al.</i> , Cincinnati Chamber of Commerce and Merchants' Exchange <i>v.</i>	378
Gardner & Clark <i>v.</i> Southern Railway Company	342
G. C. Pratt Lumber Company <i>v.</i> Chicago, Indianapolis & Louisville Railway Company	29
Georgia Peach Growers' Association <i>v.</i> Atlantic Coast Line Railroad Company <i>et al.</i>	255
Georgia Railroad <i>et al.</i> , Chamber of Commerce of Chat- tanooga <i>v.</i>	111
Georgia Southern & Florida Railway Company <i>et al.</i> , H. H. Tift <i>v.</i>	548
Glade Coal Company <i>v.</i> Baltimore & Ohio Railroad Com- pany	226
Great Northern Railway Company <i>et al.</i> , Duluth Shingle Company <i>v.</i>	489
Gulf & Ship Island Railroad Company <i>et al.</i> , Central Yel- low Pine Association <i>v.</i>	505
Hannibal & St. Joseph Railroad Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
Hewins, E. D., <i>v.</i> New York, New Haven & Hartford Rail- road Company	221
Hope Cotton Oil Company <i>v.</i> Texas & Pacific Railway Company	696
Illinois Central Railroad Company <i>et al.</i> , Cattle Raisers' Association of Texas <i>v.</i>	83
Illinois Central Railroad Company <i>et al.</i> , Central Yellow Pine Association <i>v.</i>	505
Illinois Central Railroad Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
Illinois Central Railroad Company <i>et al.</i> , C. M. Barrow <i>v.</i>	333
Illinois Central Railroad Company <i>et al.</i> , Lehman-Hig- ginson Grocer Company <i>v.</i>	460
Illinois Central Railroad Company <i>et al.</i> , Wm. Wrigley, Jr., <i>v.</i>	412

TABLE OF CASES REPORTED.

ix

	PAGE
Iowa Central Railway Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
Kansas City, St. Joseph & Council Bluffs Railroad Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
Koch, W. J. <i>v.</i> Pennsylvania Railroad Company <i>et al.</i>	675
Lehman-Higginson Grocer Company <i>v.</i> Atchison, Topeka & Santa Fé Railway Company	460
Louisville & Nashville Railroad Company <i>et al.</i> , A. G. Swaffield <i>v.</i>	281
Louisville & Nashville Railroad Company <i>et al.</i> , Central Yellow Pine Association <i>v.</i>	505
Louisville & Nashville Railroad Company <i>et al.</i> , Chamber of Commerce of Chattanooga <i>v.</i>	111
Louisville & Nashville Railroad Company <i>et al.</i> , Cincinnati Chamber of Commerce and Merchants' Exchange <i>v.</i>	378
Louisville & Nashville Railroad Company <i>et al.</i> , H. H. Tift <i>v.</i>	548
Louisville & Nashville Railroad Company, Railroad Commission of Kentucky <i>v.</i>	173
Louisville & Nashville Railway Company <i>et al.</i> , Wm. Wrigley, Jr., <i>v.</i>	412
Macon & Birmingham Railway Company <i>et al.</i> , H. H. Tift <i>v.</i>	548
Matter of Alleged Unlawful Rates and Practices in the Transportation of Coal & Mine Supplies by the Atchison, Topeka & Santa Fé Railway Company	473
Matter of Allowances to Elevators by the Union Pacific Railroad Company	309
Matter of Charges for the Transportation and Refrigeration of Fruit Shipped from Points on the Pere Marquette & Michigan Central Railroads	360
Matter of Divisions of Joint Rates and Other Allowances to Terminal Railroads	385
Matter of Divisions of Joint Rates and Other Allowances to Terminal Railroads	661

	PAGE
Matter of Publication & Filing of Tariffs on Export & Import Traffic	55
Matter of the Transportation of Salt from Hutchinson, Kansas	1
Matter of Transportation of Immigrants from New York & Other Atlantic Ports to Western Destinations	13
Matter of Transportation of Salt from Points in Michigan to Missouri River Points and Intermediate Localities	148
Mayor and City Council of Wichita, Kansas, <i>v.</i> Missouri Pacific Railway Company <i>et al.</i>	35
Merchants & Miners Transportation Company <i>et al.</i> , Chamber of Commerce of Chattanooga <i>v.</i>	111
Mershon, Schuette, Parker & Company <i>v.</i> Central Railroad Company of New Jersey <i>et al.</i>	456
Michigan Central Railroad Company, Charles M. Cist <i>v.</i>	217
Michigan Central Railroad Company <i>et al.</i> , Edward G. Davies <i>v.</i>	405
Minneapolis & St. Louis Railroad Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
Missouri, Kansas & Texas Railway Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
Missouri, Kansas & Texas Railway Company, Denison Light & Power Company <i>v.</i>	337
Missouri Pacific Railway Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
Missouri Pacific Railway Company <i>et al.</i> , Lehman-Higginson Grocer Company <i>v.</i>	460
Missouri Pacific Railway Company <i>et al.</i> , Mayor and City Council of Wichita, Kansas, <i>v.</i>	35
Mobile & Ohio Railroad Company, Aberdeen Commercial Association <i>v.</i>	289
Mobile & Ohio Railroad Company <i>et al.</i> , Central Yellow Pine Association <i>v.</i>	505
Mobile & Ohio Railroad Company <i>et al.</i> , Wm. Wrigley, Jr., <i>v.</i>	412
Mobile, Jackson & Kansas City Railroad Company <i>et al.</i> , Central Yellow Pine Association <i>v.</i>	505

	PAGE
Nashville, Chattanooga & St. Louis Railway Company <i>et al.</i> , Chamber of Commerce of Chattanooga <i>v.</i>	111
Nashville, Chattanooga & St. Louis Railway Company <i>et al.</i> , H. H. Tift <i>v.</i>	548
Nave-McCord Mercantile Company, Interveners in Lehman-Higginson Grocer Company <i>v.</i> Atchison, Topeka & Santa Fé Railway Company <i>et al.</i>	460
New Orleans & North Eastern Railroad Company <i>et al.</i> , Central Yellow Pine Association <i>v.</i>	505
New Orleans Live Stock Exchange <i>v.</i> Texas & Pacific Railway Company	327
New York, New Haven & Hartford Railroad Company <i>et al.</i> , Chamber of Commerce of Chattanooga <i>v.</i>	111
New York, New Haven & Hartford Railroad Company, E. D. Hewins <i>v.</i>	221
Norfolk & Western Railway Company <i>et al.</i> , Chamber of Commerce of Chattanooga <i>v.</i>	111
Norfolk & Western Railway Company <i>et al.</i> , Cincinnati Chamber of Commerce and Merchants' Exchange <i>v.</i>	378
Northern Pacific Railway Company <i>et al.</i> , Duluth Shingle Company <i>v.</i>	489
Ocean Steamship Company of Savannah <i>et al.</i> , Chamber of Commerce of Chattanooga <i>v.</i>	111
Omaha, Kansas City & Eastern Railroad Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
Parks, John H., <i>v.</i> Cincinnati & Muskingum Valley Railroad Company	47
Parrott, S. F., <i>et al.</i> , H. H. Tift <i>v.</i>	548
Paxton Tie Company <i>v.</i> Detroit Southern Railroad Company	422
Pennsylvania Company <i>et al.</i> , Wm. Wrigley, Jr., <i>v.</i>	412
Pennsylvania Railroad Company <i>et al.</i> , Chamber of Commerce of Chattanooga <i>v.</i>	111
Pennsylvania Railroad Company, Charles A. Thompson <i>v.</i>	640
Pennsylvania Railroad Company <i>et al.</i> , Mershon, Schuette, Parker & Company <i>v.</i>	456

	PAGE
Pennsylvania Railroad Company <i>et al.</i> , W. J. Koch <i>v.</i>	675
Pere Marquette Railroad Company <i>et al.</i> , Edward G. Davies <i>v.</i>	405
Pere Marquette Railroad Company, Richmond Elevator Company <i>v.</i>	629
Pittsburg, Cincinnati, Chicago & St. Louis Railway Company <i>et al.</i> , Cincinnati Chamber of Commerce and Merchants' Exchange <i>v.</i>	378
Pittsburg, Cincinnati, Chicago & St. Louis Railway Company <i>et al.</i> , W. J. Koch <i>v.</i>	675
Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company <i>et al.</i> , Wm. Wrigley, Jr., <i>v.</i>	412
Pitts, H. B., & Son <i>v.</i> Atchison, Topeka & Santa Fé Railway Company <i>et al.</i>	691
Pitts, H. B., & Son <i>v.</i> St. Louis & San Francisco Railroad Company <i>et al.</i> ,	684
Pratt, G. C., Lumber Company <i>v.</i> Chicago, Indianapolis & Louisville Railway Company	29
Railroad & Warehouse Commissioners of the State of Minnesota, Interveners in Chicago Live Stock Exchange <i>v.</i> Chicago Great Western Railway Company <i>et al.</i>	428
Railroad Commission of Kentucky <i>v.</i> Louisville & Nashville Railroad Company	173
<i>Re</i> Allowances to Elevators	309
<i>Re</i> Atchison, Topeka & Santa Fé Railway Company	473
<i>Re</i> Divisions of Joint Rates	385
<i>Re</i> Divisions of Joint Rates	661
<i>Re</i> Tariffs on Export & Import Traffic	55
<i>Re</i> Transportation and Refrigeration of Fruit	360
<i>Re</i> Transportation of Immigrants from New York	13
<i>Re</i> Transportation of Salt from Hutchinson, Kansas	1
<i>Re</i> Transportation of Salt from Points in Michigan	148
Richmond Elevator Company <i>v.</i> Pere Marquette Railroad Company	629
Ryley-Wilson Grocer Company, Interveners in Lehman-Higginson Grocer Company <i>v.</i> Atchison, Topeka & Santa Fé Railway Company <i>et al.</i>	460

	PAGE
St. Louis & San Francisco Railroad Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
St. Louis & San Francisco Railroad Company <i>et al.</i> , H. B. Pitts & Son <i>v.</i>	684
St. Louis & San Francisco Railroad Company <i>et al.</i> , Lehman-Higginson Grocer Company <i>v.</i>	460
St. Louis, Iron Mountain & Southern Railway Company <i>et al.</i> , Lehman-Higginson Grocer Company <i>v.</i>	460
St. Paul Union Stock Yards Company of St. Paul, Interveners in Chicago Live Stock Exchange <i>v.</i> Chicago Great Western Railway Company <i>et al.</i>	428
Santa Fé Pacific Railway Company <i>et al.</i> , Consolidated Forwarding Company <i>v.</i>	590
Santa Fé Pacific Railway Company <i>et al.</i> , Southern California Fruit Exchange <i>v.</i>	590
Seaboard Air Line Railway <i>et al.</i> , H. H. Tift <i>v.</i>	548
Seaboard Air Line Railway <i>et al.</i> , Wm. Wrigley, Jr., <i>v.</i>	412
Sioux City Live Stock Exchange of Sioux City, Interveners in Chicago Live Stock Exchange <i>v.</i> Chicago Great Western Railway Company <i>et al.</i>	428
Sioux City Stock Yards Company, Interveners in Chicago Live Stock Exchange <i>v.</i> Chicago Great Western Railway Company <i>et al.</i>	428
Southeastern Freight Association <i>et al.</i> , H. H. Tift <i>v.</i>	548
Southern California Fruit Exchange <i>v.</i> Southern Pacific Company <i>et al.</i>	590
Southern California Railway Company <i>et al.</i> , Consolidated Forwarding Company <i>v.</i>	590
Southern California Railway Company <i>et al.</i> , Southern California Fruit Exchange <i>v.</i>	590
Southern Pacific Company <i>et al.</i> , Consolidated Forwarding Company <i>v.</i>	590
Southern Pacific Company <i>et al.</i> , Southern California Fruit Exchange <i>v.</i>	590
Southern Railway Company <i>et al.</i> , Central Yellow Pine Association <i>v.</i>	505
Southern Railway Company <i>et al.</i> , Chamber of Commerce of Chattanooga <i>v.</i>	111

	PAGE
Southern Railway Company, Gardner & Clark <i>v.</i>	342
Southern Railway Company <i>et al.</i> , H. H. Tift <i>v.</i>	548
Southern Railway Company, John W. Blackman, Jr., <i>v.</i>	352
Southern Railway Company <i>et al.</i> , Wm. Wrigley, Jr., <i>v.</i>	412
South St. Joseph Live Stock Exchange, Interveners in Chicago Live Stock Exchange <i>v.</i> Chicago Great West- ern Railway Company <i>et al.</i>	428
Swaffield, A. G., <i>v.</i> Atlantic Coast Line Railroad Company <i>et al.</i>	281
Tariffs on Export & Import Traffic, <i>Re</i>	55
Texas & Pacific Railway Company, Hope Cotton Oil Com- pany <i>v.</i>	696
Texas & Pacific Railway Company, New Orleans Live Stock Exchange <i>v.</i>	327
Texas & Pacific Railway Company <i>et al.</i> , H. B. Pitts & Son <i>v.</i>	684
Texas & Pacific Railway Company <i>et al.</i> , Lehman-Hig- ginson Grocer Company <i>v.</i>	460
Thompson, Charles A., <i>v.</i> Pennsylvania Railroad Com- pany	640
Tift, H. H., <i>v.</i> Southern Railway Company <i>et al.</i>	548
Transportation and Refrigeration of Fruit, <i>Re</i>	360
Transportation of Immigrants from New York, <i>Re</i>	13
Transportation of Salt from Hutchinson, Kansas, <i>Re</i>	1
Transportation of Salt from Points in Michigan, <i>Re</i>	148
Union Stock Yards Company of Omaha, Interveners in Chicago Live Stock Exchange <i>v.</i> Chicago Great West- ern Railway Company <i>et al.</i>	428
Vicksburg, Shreveport & Pacific Railroad Company <i>et al.</i> , Central Yellow Pine Association <i>v.</i>	193
Wabash Railroad Company <i>et al.</i> , Cattle Raisers' Associa- tion of Texas <i>v.</i>	83
Wabash Railroad Company <i>et al.</i> , Chicago Live Stock Ex- change <i>v.</i>	428

TABLE OF CASES REPORTED.

XV

	PAGE
Wisconsin Central Railway Company <i>et al.</i> , Chicago Live Stock Exchange <i>v.</i>	428
Wrigley, Wm., Jr., <i>v.</i> Cleveland, Cincinnati, Chicago & St. Louis Railway Company <i>et al.</i>	412
Yazoo & Mississippi Valley Railroad Company <i>et al.</i> , C. M. Barrow <i>v.</i>	333

TABLE OF CASES CITED.

	PAGE
Allen <i>v.</i> L. N. A. & C. R. Co. 1 I. C. C. Rep. 199	34
Allowances to Elevators by Union P. R. Co., <i>Re</i> , 10 I. C.	
C. Rep. 309	399
A., T. & S. F. Ry. Co., <i>Re</i> , 7 I. C. C. Rep. 240	660
 Board of Trade of Chattanooga <i>v.</i> East Tennessee, V. & G.	
R. Co. 5 I. C. C. Rep. 546, 4 Inters. Com. Rep. 213	112
Board of Trade of Lynchburg <i>v.</i> Old Dominion Steamship	
Co. 6 I. C. C. Rep. 632, 646	98, 350
Butchers' & Drovers' Stock Yards Co. <i>v.</i> Louisville & N.	
R. Co. 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed.	
35	186, 189
 Carr <i>v.</i> Northern Pacific Railway Company, 9 I. C. C.	
Rep. 1.	251
Cartage Case, see Interstate Commerce Commission <i>v.</i>	
Detroit, G. H. & M. R. Co.	205
Cattle Raisers' Association of Texas <i>v.</i> Fort Worth &	
Denver City Railway Company <i>et al.</i> 7 I. C. C.	
Rep. 513	447
Central Stock Yards Co. <i>v.</i> Louisville & N. R. Co. 112	
Fed. 823	191
Central Stock Yards Co. <i>v.</i> Louisville & N. R. Co. 55 C.	
C. A. 63, 118 Fed. 113	192
Central Stock Yards Co. <i>v.</i> Louisville & N. R. Co. 192 U.	
S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339	374
Central Yellow Pine Association <i>v.</i> Illinois Central Rail-	
road Company <i>et al.</i> 10 I. C. C. Rep. 505	579, 582
Central Yellow Pine Association <i>v.</i> Vicksburg, Shreveport	
& Pacific Railroad Co. 10 I. C. C. Rep. 193	399
	545, 546
	xvii

	PAGE
Charges for the Transportation and Refrigeration of Fruit Shipped from Points in Michigan on the Pere Marquette and Michigan Central Railroads, Matter of, 10 I. C. C. Rep. 360	615
Chicago Board of Trade <i>v.</i> Chicago & Alton R. Co. <i>et al.</i> 4 I. C. C. Rep. 158	430, 452
Cleveland, C., C. & St. L. R. Co. <i>v.</i> Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722	225
Consolidated Forwarding Co. <i>v.</i> Southern P. Co. 9 I. C. C. Rep. 182	615
Copp <i>v.</i> Louisville & N. R. Co. 50 Fed. 164	100
Covington & Lexington Turnpike Road Co. <i>v.</i> Sanford, 164 U. S. 596, 597, 41 L. ed. 566, 17 Sup. Ct. Rep. 198	585
Covington Stock Yards Co. <i>Keith</i> , 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461	185
Crews <i>v.</i> Richmond & D. R. Co. 1 I. C. C. Rep. 401, 1 Inters. Com. Rep. 703	213
Danville <i>v.</i> Southern Railway Co. 8 I. C. C. Rep. 409	344
Denaby Main Colliery Co. <i>v.</i> Manchester, Sheffield & Lincolnshire Railway Co. L. R. 11 App. Cas. 97	209, 350
Diamond Mills <i>v.</i> B. & M. R. R. 9 I. C. C. Rep. 311	681
Divisions of Joint Rates and Other Allowances to Terminal Railroads, Matter of, 10 I. C. C. Rep. 385	673
Duncan <i>v.</i> Atchison, T. & S. F. Ry. Co. <i>et al.</i> 6 I. C. C. Rep. 85	225
East Tennessee, Va. & Ga. Railway <i>v.</i> Interstate Commerce Commission, 39 C. C. A. 422, 99 Fed. Rep. 61	541, 580
East Tennessee, V. & G. R. Co. <i>v.</i> Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516	109, 134, 472
Export & Domestic Rates, <i>Re</i> , 8 I. C. C. Rep. 214	63
Express Cases, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628	374

TABLE OF CASES CITED.

xix

	PAGE
Georgia Peach Growers' Association <i>v.</i> Atlantic Coast Line Railroad Co. 10 I. C. C. Rep. 255 . . .	621
Glade Coal Company Case, 10 I. C. C. Rep. 226 . . .	647
Guild <i>v.</i> Hale, 15 Mass. 455	104
Harp <i>v.</i> Choctaw, O. & G. Ry. Co. 118 Fed. 169	245, 647
H. H. Tift <i>v.</i> Southern Railway Company <i>et al.</i> 123 Fed. Rep. 789	555
Holmes <i>v.</i> Southern Ry. Co. 8 I. C. C. Rep. 568	535, 542
Import Rate Case,	63
Independent Refiners' Asso. <i>v.</i> Western New York & P. R. Co. 6 I. C. C. Rep. 378	98
Interstate Commerce Commission <i>v.</i> Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563	401
Interstate Commerce Commission <i>v.</i> Chicago, B. & Q. R. Co. 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. Rep. 824	88
Interstate Commerce Commission <i>v.</i> Clyde S. S. Co. <i>et</i> <i>al.</i> 181 U. S. 29, 45 L. ed. 729, 21 Sup. Ct. Rep. 512	109
Interstate Commerce Commission <i>v.</i> Detroit, G. H. & M. R. Co. 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. Rep. 986	205
Interstate Commerce Commission <i>v.</i> Southern Pacific Co. <i>et al.</i> 132 Fed. 829	578, 592, 615
Interstate Commerce Commission <i>v.</i> Southern Pacific Co. <i>et al.</i> 123 Fed. Rep. 597	592
Johnston-Larimer Dry Goods Company <i>v.</i> Atchison, Topeka & Santa Fé Ry. Co. 6 I. C. C. Rep. 568	462, 472
Joint Traffic Association Case, 171 U. S. 569, 571, 577, 43 L. ed. 287, 288, 290, 19 Sup. Ct. Rep. 25	541, 580
Kauffman Milling Company <i>v.</i> Missouri Pacific Railway Company, 4 I. C. C. Rep. 417, 3 Inters. Com. Rep. 400	36, 37, 38, 40, 45

	PAGE
Kentucky & I. Bridge Co. <i>v.</i> Louisville & N. R. Co. 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 37 Fed. 567	188
Little Rock & M. R. Co. <i>v.</i> St. Louis & S. W. R. Co. 4 Inters. Com. Rep. 854, 26 L. R. A. 192, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775	188
Louisville & N. R. Co. <i>v.</i> Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209	109
Macloon <i>v.</i> Boston & M. R. R. Co. <i>et al.</i> 9 I. C. C. Rep. 642	224
Marten <i>v.</i> L. & N. R. R. Co. 9 I. C. C. Rep. 589	547
Michigan Insurance Bank <i>v.</i> Eldred, 130 U. S. 693, 32 L. ed. 1080, 9 Sup. Ct. Rep. 690	99
New Orleans Cotton Exchange <i>v.</i> Louisville, N. O. & T. R. Co. 4 I. C. C. Rep. 694, 3 Inters. Com. Rep. 523	63
New York Produce Exchange <i>v.</i> New York C. & H. R. R. Co. 3 I. C. C. Rep. 137, 2 Inters. Com. Rep. 553	63
Oregon Short Line & U. N. R. Co. <i>v.</i> Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 465	188
Paine Brothers & Company <i>v.</i> Lehigh Valley Railroad Company <i>et al.</i> 7 I. C. C. Rep. 218	251
Petition of the Louisville & Nashville Railroad Company, Matter of, 1 I. C. C. Rep. 31, 1 Inters. Com. Rep. 279	250
Proposed Advances in Freight Rates, Matter of, 9 I. C. C. Rep. 382	536, 539, 620
Pullman Palace Car Co. <i>v.</i> Missouri P. R. Co. 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194	374
Railroad Commission <i>v.</i> Louisville & N. R. Co. 10 I. C. C. Rep. 173	374
Railroad Commission of Kansas <i>v.</i> Atchison, T. & S. F. R. Co. 8 I. C. C. Rep. 304, 308	45, 107
Ratican <i>v.</i> Terminal R. Asso. 114 Fed. 666	100
Richmond <i>v.</i> Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788	104

TABLE OF CASES CITED.

xxi

	PAGE
Riddle, Dean & Company <i>v.</i> Pittsburg & Lake Erie Railroad Company, 1 I. C. C. Rep. 374, 1 Inters. Com. Rep. 688	245
Robinson <i>et al.</i> <i>v.</i> Baltimore & Ohio Railroad Company (Decided by C. C. App. 4th C. March 14, 1904)	245
Smyth <i>v.</i> Ames (Nebraska Freight Rate Case) 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418	538
	539, 585
Squire & Co. <i>v.</i> Michigan Central R. Co. <i>et al.</i> 4 I. C. C. Rep. 611	430
Texas & P. R. Co. <i>v.</i> Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666	65, 110
Transportation of Salt from Hutchinson, Kansas, <i>Re</i> , 10 I. C. C. Rep. 1	402
Truck Farmers' Case, 6 I. C. C. Rep. 295	376
Union Terminal R. Co. <i>v.</i> Board of Railroad Commissioners of Kansas, 54 Kan. 352, 38 Pac. 290	107
United States <i>v.</i> Freight Association, 166 U. S. 341, 41 L. ed. 1027, 17 Sup. Ct. Rep. 540	541, 580
United States <i>v.</i> New York, 160 U. S. 598	103
United States <i>ex rel.</i> Coffman <i>v.</i> Norfolk & Western Railway Company <i>et al.</i> 109 Fed. 831	245
Unlawful Rates in the Transportation of Cotton, Matter of, 8 I. C. C. Rep. 121	214
Wight <i>v.</i> United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822	206, 673

J. T. Marchand and *W. G. Fairchilds* for the Commission.

J. H. Richards for the Missouri Pacific Ry. Co.

H. Whiteside for the Atchison, Topeka & Santa Fé Ry. Co.

F. L. Martin and *R. A. Jackson* for the Chicago, Rock Island, & Pacific Ry. Co.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, Commissioner:

This inquiry was undertaken by the Commission upon its own motion in consequence of informal complaint that the Hutchinson & Arkansas River Railroad, while not a railroad in fact, was receiving divisions of the rate for the transportation of salt from Hutchinson, Kansas. Two hearings were held, one at Hutchinson, December 5, 1903, and another at Chicago, December 22, 1903. The Hutchinson & Arkansas River Railroad Company, the Hutchinson-Kansas Salt Company, and the three railway systems entering Hutchinson were all represented upon each of these hearings.

Hutchinson is the center of the salt industry in Kansas, although plants are in operation at several other points in that vicinity, the salt beds being of extensive area. Kansas salt mills are at the present time known as "trust" and "independent." The Commission has no information as to the existence of any trust; but it did appear that the so-called "trust" mills, nine in number, with a producing capacity of 3,500 barrels per day, in the aggregate, were all owned or controlled by the Hutchinson-Kansas Salt Company, while the "independent" mills, seven in number, with an individual capacity of from 200 to 500 barrels, and an aggregate daily capacity of 2,500, were each operated by a single person or company.

Kansas salt is produced by evaporating brine pumped from salt wells. The salt as it leaves the evaporating pan is known as "bulk salt." Ordinarily, salt is marketed in barrels or other packages, but the packing houses, which use very large quantities, receive it from the mill in bulk in carload lots, thus avoiding the expense of barreling or otherwise packing. To-day, the rate on bulk salt from Hutchinson to Kansas City and other

Missouri River points taking the Kansas City rate, is 10 cents per hundred pounds, on barrel salt 12 cents. During the last five years this rate has been as low as 6 $\frac{2}{3}$ cents. It was suggested in the testimony, although this was not gone into in detail, that salt rates from Hutchinson to the Missouri River had not been strictly maintained until the spring of 1902. Since then it was said that the published rate had in all cases been collected.

In July, 1902, a railroad corporation was organized under the laws of Kansas, known as the Hutchinson & Arkansas River Railroad Company. The avowed object of this company was to construct a railroad from Kechi to Hutchinson for the purpose of bringing the St. Louis & San Francisco Railroad into the latter town. A survey of this line was effected and estimates made of the amount of grading required, but nothing was ever done toward the construction of the road itself. Another purpose was, it was said, to reconstruct, combine, and connect the plants owned by the Hutchinson-Kansas Salt Company in such a way that cars could be conveniently handled in and out of its different mills.

The largest mill operated by the Hutchinson-Kansas Salt Company is known as the Morton mill, with a capacity of about 1,100 barrels per day. The tracks of the Atchison, Topeka & Santa Fé Railway Company run on one side, and those of the Chicago, Rock Island & Pacific Railway Company on the other side of this mill, and there are two switches connecting both sides of the mill with these tracks. There is also what is called the "cinder" track, the use of which did not appear. The entire length of these sidings is between 4,000 and 5,000 feet. They had been constructed by the Morton company for the purpose of connecting its plant with both of these railroad systems, and also, apparently, for convenience in unloading the coal used in the operation of that mill, and had been in use for several years when, in July, 1902, this railroad company was organized. Soon after its organization, the Hutchinson & Arkansas River Railroad Company bought of the Hutchinson-Kansas Salt Company these side tracks for about \$8,000; and this was the only track which that company owned. It had no equipment of any kind.

10 I. C. C. REP.

It was said that the reason for not constructing its proposed track from Kechi was because the St. Louis & San Francisco had been absorbed by the Rock Island system, and therefore no longer desired an independent entrance into Hutchinson.

The capital stock of the Hutchinson & Arkansas River Railroad Company consists of 800 shares, of the par value of \$100 each, of which 794 were originally subscribed for and are still owned by one Joseph P. Tracy; the other 6 shares are held, 1 each, by the directors of the company. These directors are, Joseph P. Tracy, D. Peterkin, Mark Morton, Joy Morton, J. C. Baddeley, Frank Vincent and G. Phillips. The officers of the railroad company are: President, Joy Morton; vice president, Frank Vincent; treasurer, Mark Morton; general manager, Joseph P. Tracy; assistant general manager, Frank Vincent. Joy Morton is the president, and Mark Morton the treasurer, of the Hutchinson-Kansas Salt Company, while Frank Vincent is the resident manager of its works at Hutchinson. It will be seen that all the officers of the railroad company except Mr. Tracy, are also officers or employees of the Hutchinson-Kansas Salt Company. The testimony did not show definitely who Mr. Tracy was. Baddeley and Phillips are clerks in the office of the Hutchinson-Kansas Salt Company, and Peterkin the private secretary of Joy Morton. Upon the first hearing, Mr. Joy Morton testified that he and those whom he represented owned the entire capital stock of the Hutchinson-Kansas Salt Company. Upon the second hearing he gave an extended explanation of his individual ownership, but so far as this case is concerned, it seems unimportant to report those facts.

Three railroad systems enter Hutchinson and transport salt from there to various markets. These are the Atchison, Topeka & Santa Fé Railway; the Chicago, Rock Island & Pacific Railway; and the Missouri Pacific Railway. Soon after the organization of the Hutchinson & Arkansas River Railroad Company, and the purchase of the switches of the Morton plant from the Hutchinson-Kansas Salt Company, Mr. Tracy approached the traffic officials of the three systems above named. It did not appear with which one he first negotiated, but his statements to all were identical. He represented that, owing to competitive

conditions upon the Missouri River, both foreign salt and domestic salt from the East were being sold there in large quantities, and that if any bulk salt was to be moved from the Hutchinson field to the Missouri River packing houses, some inducement must be held out to the producers; and he stated that if they would allow the Hutchinson & Arkansas River Railroad Company a division of the rate from Hutchinson to the Missouri River, a price would be named on that salt which would sell it in competition with other sources of supply, and which would at least continue the present movement of bulk salt from Hutchinson to various Missouri River points.

The rate on bulk salt at this time from Hutchinson to Kansas City was 10 cents—12 cents to Omaha—and an agreement was entered into with Mr. Tracy that the Hutchinson & Arkansas River Railroad Company should be allowed a division of 25 per cent of this rate, which should, however, in no case exceed 50 cents per ton, on all bulk salt shipped to Missouri River points. In accordance with this, the Santa Fé Company and the Missouri Pacific Company issued in due form tariffs by which the Hutchinson & Arkansas River Railroad Company was made a party to all their salt rates from Hutchinson in every direction. The tariff of the Rock Island Company named the Hutchinson & Arkansas River Railroad Company a party to tariffs on bulk salt only.

After the making of this arrangement, there was no change whatever in the method of handling this salt from the Morton mill or from any other mill. It was billed in the same way, was taken out by the same engine, was transported in exactly the same manner as it had been. The Hutchinson & Arkansas River Railroad Company issued no bill of lading and in no way participated, either in fact or on paper, in the transportation of this commodity. The only difference was that the railroad company, instead of the Hutchinson-Kansas Salt Company, kept these switch tracks in repair.

The testimony showed that under these tariffs, divisions were allowed by the Santa Fé on bulk salt transported from Hutchinson to the Missouri River, and on nothing else; that this was true of the Rock Island Company; but that the Missouri Pa-
10 I. C. C. REP.

cific Company, in addition to allowing this division upon bulk salt, allowed the same division upon barrel salt when destined to certain points in Arkansas, and, perhaps, Oklahoma and Indian Territory. These divisions continued from about the 1st of August, 1902, down to the time of hearing, except that the practice seems to have been interrupted for a short time after the passage of the Elkins bill.

The Hutchinson & Arkansas River Railroad Company and the three railway systems granting these divisions were required to state the amount of money paid under them. From their statements it would appear that up to the present time there has been actually paid in all, \$15,301.39. The last payment by the Atchison was October 12, 1903, by the Rock Island, August 6, and by the Missouri Pacific, November 9. There appeared to be no fixed time for the making of these settlements and payments. The Hutchinson & Arkansas River Railroad Company would, whenever it saw fit, render a statement showing that certain carloads of bulk salt had been shipped over the line to which the statement was rendered and from which the division was claimed. That company would thereupon check up this statement, and if it found that it had actually transported those carloads of salt from Hutchinson to the Missouri River, authorize the payment of the bill. It was admitted by all the railways that this was not the usual method of keeping accounts of a similar nature with their other connections. It did not appear whether the various roads had transported bulk salt to the Missouri River subsequent to the dates of the last payments. If they have done so, there would be due the Hutchinson & Arkansas River Railroad Company, under the arrangement, such further sum as the division amounts to.

Salt would pass over the Hutchinson & Arkansas River Railroad only when shipped from the Morton mill. Most of the bulk salt sent to the Missouri River by the Hutchinson-Kansas Salt Company came from this plant, but in some instances shipments were made to packing houses from its other mills. Bulk salt also moved for a time, after the granting of these divisions began, from one or more independent plants at Hutchinson. The suggestion was made that these divisions were paid on all bulk

salt from Hutchinson. Mr. Morton testified that they were allowed only on shipments from the Morton mill. The Commission required from the parties certain statements with a view of ascertaining what the fact was, but a misapprehension of exactly what was wanted, upon the part of one of the railway companies, renders this information of no value as bearing upon that point, and it has not seemed best to further delay the publication of this report. From the manner in which the transaction went on, we are inclined to the opinion that the division was claimed and allowed upon all shipments of salt to the Missouri River made by the Hutchinson-Kansas Salt Company; but this cannot be definitely found.

At the time of the organization of the Hutchinson & Arkansas River Railroad Company, 10 per cent of the par value of the capital stock was paid in in cash. The \$8,000 from this source, and the amount realized from divisions as above stated, made up the total of its cash income. Of this, in round numbers, \$8,000 has been expended for tracks, \$4,000 for certain land at Hutchinson, and \$2,000 for incidental expenses. This leaves a balance of some \$9,000, which was said to be in the treasury of the company.

Assuming that the full tariff rate is paid on the coal used, the cost of producing salt at Hutchinson is, approximately, \$2 per ton, not including office expenses and interest on plant. After the granting of this division, the Hutchinson-Kansas Salt Company entered into contracts with various parties upon the Missouri River to furnish salt on the basis of \$2.10 at Hutchinson, or at a delivered price of \$4.10 per ton at Kansas City, St. Joseph, and other points taking the 10-cent rate, and \$4.60 per ton at Omaha, which took the 12-cent rate. Previous to the granting of these divisions, independent manufacturers at Hutchinson had shipped considerable quantities of bulk salt to the Missouri River, but since the expiration of the contracts which were then in force practically none has been sold there. The manager of one independent firm testified that he had a contract with the Swift Company to supply it with salt at Kansas City, St. Joseph, and Omaha, which expired in April, 1902; that this contract named a price of \$4.25 at Kansas City; that coal had

10 I. C. C. REP.

advanced, approximately, 50 cents per ton, and that this would increase the price of manufacturing salt 25 cents per ton. He, therefore, thought that he ought to obtain some advance in price upon his contract with the Swift Company; but the Hutchinson-Kansas Company took the contract from him at a price of \$4.10. The independent producers insisted that this division was equivalent to the payment of a rebate of 50 cents per ton; that 50 cents per ton was a fair profit in the manufacture of salt; and that the Hutchinson-Kansas Salt Company, with that advantage, could run at a profit while the independent operator did business at an actual loss.

The various railroad systems entering Hutchinson urged that the granting of this division was not a violation of law since they simply allowed, as they had a perfect right to, a division to a connecting road. The Hutchinson & Arkansas River Railroad Company insisted that it had paid no rebate and been guilty of no infraction of law, since the money which had been received by it under this arrangement was still either in its treasury or had been expended for property which it then owned. The Hutchinson-Kansas Salt Company declared that it had violated no law, for it had received no money from the various systems actually transporting this salt, nor from the Hutchinson & Arkansas River Railroad Company.

Mr. Morton, the president both of the Railroad Company and the Hutchinson-Kansas Salt Company, testified that neither he nor the salt company had derived any benefit from the payment of these divisions. Being asked who Mr. Tracy was; why he had subscribed to this stock; for whose benefit he held the stock; he stated, at first, that Mr. Tracy had purchased it on his own account, but finally said that the purchase had been made at his (Morton's) suggestion, and that while Mr. Tracy did not hold the stock as legal trustee for him or any other person, he would probably dispose of it and vote it as Morton requested him to do. If this is the case, this money, in the hands of the Hutchinson & Arkansas River Railroad Company, can at any time be diverted to any purpose or person as Mr. Morton may direct. Mr. Morton admitted that the price of \$2.10 was an extremely low one, and would not have been made had not the

division been given the railroad company, but insisted that the direction to make that price was given by him, and without any expectation or intention that any portion of the division should be paid to the Hutchinson-Kansas Salt Company.

The cost of constructing and equipping a modern salt mill with a capacity of 500 barrels per day is about \$30,000. The cost of manufacturing salt, as already said, is about \$2.00 per ton. 500 barrels of salt weigh 70 tons. It must be evident that, as said in the testimony, 50 cents per ton would be a living profit in the production of salt. Assuming that the Hutchinson-Kansas Salt Company has the benefit of this division, it can lay down salt in Kansas City for \$3.50 per ton, while its competitors at Hutchinson cannot place that same salt there for less than \$4.00 per ton. In other words, the Hutchinson-Kansas Salt Company can, in furnishing the salt used by these packing houses, operate at a fair profit, while other mills at Hutchinson are making nothing. Apparently, under these conditions, the Hutchinson-Kansas Company could drive every other competitor out of that business; and such has been the actual result, as the testimony showed. Every other manufacturer at Hutchinson has been obliged to withdraw from the bulk salt business upon the Missouri River.

Up to the present time, this division has been allowed by the Rock Island and Santa Fé systems on bulk salt only, but the tariffs of the Santa Fé and Missouri Pacific embrace all salt; divisions have been actually allowed by the Missouri Pacific in some instances on barrel salt, and if what has been done is lawful, they might be allowed in all cases; which would mean that the Hutchinson-Kansas Salt Company could shut down every other salt mill in the state of Kansas. The legality of the transaction is, therefore, of great practical importance.

We think it is plainly illegal. The Hutchinson & Arkansas River Railroad Company appears to be a legal corporation. The original purpose may have been to construct a bona fide railroad. It is possible that the institution as now constituted may be technically a railroad under the laws of Kansas; but looking to the substance, and not the form, it is purely a scheme for the purpose of obtaining a concession in the rate. It owns no equip-

10 I. C. C. REP.

ment; it issues no bill of lading; it performs no service. Its sole function is to absorb one-fourth of the entire rate.

It is evident that the traffic managers who allowed this division did not regard it in the light of an ordinary bona fide arrangement with a connecting line, but rather as a concession in the rate. The traffic manager of the Rock Island system testified that the facilities furnished his road by the Hutchinson & Arkansas River Railroad in consideration of which the division was allowed, were the use of a switch track long enough to hold seven or eight cars. The traffic manager of the Santa Fé testified that he allowed the division instead of reducing the rate on bulk salt, because the reduction of that rate would probably have necessitated a corresponding reduction of the rate on barrel salt.

These gentlemen stated that they allowed the division for the purpose of inducing the movement of salt to the Missouri River, because otherwise the cost of laying down Kansas salt at the Missouri River was too great to enable manufacturers to meet competition from other quarters. Manifestly, the division could not have this effect unless in some way it inured to the benefit of those who produced the salt. One or more of the traffic managers, when asked if this were not so, answered that they gave the matter no thought whatever. It was their duty to give it thought. They had no right to shut their eyes to obvious conclusions; to grant this railroad which had no substantial existence, in fact, a portion of this rate without considering what the necessary consequences were. It is said that neither the Hutchinson-Kansas Salt Company nor those in control of that company have ever received any actual benefit from these divisions, since the proceeds from that source are still the property of the Hutchinson & Arkansas River Railroad Company. Mr. Tracy is the servant of Mr. Morton. He can and will at any moment dispose of the money and property which has resulted or may result from these divisions, as his superior directs. The fact that Mr. Morton has never, up to the present moment, seen fit to transfer this from the possession of his agent to himself, cannot be material.

It should be carefully noted that we do not express an opin-

ion that the granting of a division to an industrial road which is a bona fide railroad and performs an actual service of value, is necessarily illegal, because that road is owned or controlled by the shipper. That question is not considered or passed upon here. We hold that this so-called railroad is not in good faith, but a mere subterfuge.

While the effect of this division has been to practically exclude all salt manufacturers except the Hutchinson-Kansas Salt Company from the bulk salt business upon the Missouri River, it should be said in justice to all parties that the present condition of the independent salt producer in Kansas is extremely prosperous. The territory within which Kansas salt can be profitably marketed is limited by the freight rate. A certain amount of salt is naturally consumed within this territory, and a moderate reduction or advance in price does not materially affect the quantity consumed. The Hutchinson-Kansas Company fixes the price at which this salt is sold, the other operators following its lead in this respect. So long as production is so limited that there is no glut in the market, these prices can be maintained. The testimony indicated that at the present time all the independent mills are running to their full capacity and selling their output at a much greater profit than fifty cents per ton, while more or less of the capacity of the so-called trust mills is idle.

Apparently, while making use of this concession to drive its competitors out of the bulk salt business upon the Missouri River, the Hutchinson-Kansas Company had found it necessary to shut down part of its mills in order to maintain the price of barrel salt, thereby in effect giving those same competitors a more profitable market for their product. There is, however, no guaranty that present conditions will continue; it is not at all probable that the so-called trust will be satisfied to stand all the limiting of production which will be necessary in that territory in the future; and the independent producers insist, we think justly, that no one producer should be armed with this weapon with which to strike down, if occasion requires, a rival. The cost of transportation should be absolutely alike to all these shippers upon all varieties of their product.

10 I. C. C. REP.

This proceeding is merely one of inquiry, and no order to cease and desist can be made; nor would such an order add anything to the obligation of the statute. One of the railway systems has, however, already canceled its tariffs in connection with the Hutchinson & Arkansas River Railroad; at the hearing, Mr. Morton stated that if, in the opinion of the Commission, the present arrangement was illegal, he desired to discontinue it, and the same intimation was given by the other two railroads interested. It has seemed proper, therefore, to express an opinion as to the lawfulness of the practices disclosed. So far as these practices may amount to violations of the criminal features of the Act to regulate commerce, the statute apparently makes it our duty to bring them to the attention of the United States district attorney for the proper district, who is required to prosecute such violations under the direction of the Attorney General. This, in effect, places the whole matter in the hands of the Department of Justice, and the more direct way seems to be to refer it there in the first instance, which will be done.

10 I. C. C. REP.

(No. 622.)

IN THE MATTER OF TRANSPORTATION OF IMMIGRANTS FROM NEW YORK AND OTHER ATLANTIC PORTS TO WESTERN DESTINATIONS.

Decided January 27, 1904.

Upon investigation by the Commission of practices applied in the west-bound transportation of immigrants from New York and other Atlantic ports, it appeared, among other things, that this immigrant traffic is divided between the carriers in agreed proportions based upon the proportion of the domestic passenger traffic done by each line; that, apparently, such a practice cannot be made effective in respect to any other class of passenger business; that the immigrants are carried from the seaboard at domestic published rates; and that the arrangements adopted by the carriers in connection with the immigration authorities of the United States for handling immigrant business have efficiently promoted the protection and greatly improved the treatment and comfort of immigrants: *Held*, That whether section 5 of the Act to regulate commerce, prohibiting carriers from entering into any contract, agreement or combination "for the pooling of freights by different and competing railroads or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof," applies to such a division of passengers as has been shown to exist in this case is, at least, doubtful; that no discrimination as against individuals, classes or localities results from the handling by the carriers of this immigrant business at domestic published rates, and that there is no justification at this time for the issuance of any order in the premises.

J. T. Marchand and Robert N. Moore for the Commission.

REPORT AND OPINION OF THE COMMISSION.

CLEMENTS, *Commissioner*:

Based on an informal report of the existence of a pooling ar-
10 I. C. C. REP.

rangement for the division of west-bound immigration traffic, this proceeding was instituted by the Commission on its own motion, having for its purpose an investigation into the rates and practices of common carriers engaged in the transportation by railroad of immigrants carried by such carriers from New York and other Atlantic ports to western destinations, including, as set forth in the order of the Commission, "the operation and conduct of the Immigrant Bureau of the Western Passenger Association."

In pursuance of this inquiry a hearing was held at New York and the testimony taken of representatives of the various railroad organizations and the Immigration Bureau regarding the sale of tickets to, the receiving, and forwarding of, immigrants arriving at that port, and the following facts elicited:

Under the second section of the Act to regulate immigration, approved August 3, 1882, the Secretary of the Treasury was authorized to enter into contracts with such State commission, board or officers, as may be designated for that purpose by the governor of any State, to take charge of the local affairs of immigration in the ports of such State.

Under this arrangement and previous to 1894, the immigrant was not ticketed beyond New York, and the traffic was mostly handled by middlemen, who received large commissions, maintained agencies in foreign emigration centers, received the immigrants in New York, and forwarded those for far western points to St. Louis or Chicago, whence they were finally sent to destination by the route paying the highest commission to the middleman, sometimes amounting to sixty per cent.

The revolution in the system of handling and caring for immigrants grew out of many considerations besides sympathy for the alien or any consuming desire to safeguard him from the temptations and dangers of middlemen, boarding-houses and the so-called grafters who beset his path from the moment of landing until he reached his destination.

There was at the close of 1892 grave fear of an invasion of an epidemic of cholera, and it was the consensus of opinion among those who took the greatest interest in the subject that this threatened danger lay in the turbid stream of emigra-

tion pouring from unnumbered sources in Continental Europe on our shores, to be again scattered and absorbed by communities in every part of the United States.

So overwhelming seemed the danger, so necessary some precautionary measures of self-defense, that it was seriously proposed to interdict all immigration for a period of twelve months, and on this proposition an elaborate Congressional investigation was entered into.

Among the strenuous objections to so drastic a measure was the fear that such a course might bankrupt certain steamship lines, or at least lead to so great an advance in cabin fares from Europe as to seriously interfere with the foreign attendance at the Columbian Exposition.

Some of the ocean carrying lines were contemplating the temporary discontinuance of the carriage of steerage passengers, in order to discourage or put a stop to the then common practice of prepaid tickets.

Any sort of restrictive legislation was, by those whose experience qualified them to judge,—both the authorities and the representatives of the steamship lines,—believed to be of doubtful utility, since to discourage or prevent immigration through its fixed channels, at regular ports, could not entirely protect the country, but would scatter entry along the long frontier of our northern boundary or our thousands of miles of coast, vastly increasing the danger, since these were certainly impossible of being as adequately policed as were the important ports, already fitted with the machinery for handling the increasing numbers of aliens clamoring for admission.

The steamship lines were impatient under the system, or lack of system, by which tickets were purchased anywhere in the United States and sent abroad, prepaid, for passage, which left them always in doubt as to patronage and yet responsible under the immigration laws for the introduction of impossible or undesirable aliens.

The railroads were at the mercy of the middlemen, who handled nearly all immigrants. To these middlemen were given commissions so large as to interfere with the revenues of the roads. They disturbed the equilibrium of traffic by throwing

10 I. C. C. REP.

its bulk to most favored, because most liberal, roads, and the immigrants, for the most part, had no benefit of the commissions paid, but were compelled to pay full fare, which the carriers did not get.

The western lines then got together with the avowed purpose of crowding out the scalper or middleman. All the roads west of Chicago and St. Louis, at the time of the inauguration of this investigation were organized into the Western Passenger Association, which has been in existence for nearly a score of years.

In November of 1893 the General Western Passenger Association, composed of representatives of the interested railroad companies, held a special meeting and passed a series of resolutions, providing and agreeing—

That each line should make by November 30, 1893, a full report of all commissions to be paid on immigrant traffic to December 31, 1893, to be open to inspection, and all lines to be paid on an equality.

That after January 1, 1894, the only commissions to be paid should be such per cent of the gross revenues as might be fixed by the advisory committee; regular tariff rates to be fixed.

That a joint agent should be stationed at New York, under the direction of the chairman, to control traffic, secure information and protect the association. On authority of the chairman, association lines might adopt such measures in emergency as to meet any inside or outside competition and secure fullest possible protection to the association.

After January 1, 1894, all west-bound immigrant traffic should be handled only on tickets of Trunk Line or other authorized issue.

No commissions of any kind were to be paid Trunk Lines on immigrant or on second-class tickets through New York, Philadelphia, Baltimore or Boston, but might be paid to Canadian lines on condition that they report weekly to the chairman, and the routing via such lines be subject to the direction of the Committee.

To make the foregoing effective, it was agreed there should be an equitable division of all immigrant traffic by a joint com-

mittee consisting of the chairman of the Western Passenger Association, the secretary of the Trans-Missouri Committee, and the secretary of the Colorado-Utah Committee.

Commissions were to be paid through the general officers of the association lines, but no commissions to be paid until vouchers were approved by the Chairman, and checks must be sent through the Chairman.

No commissions were to be paid on east-bound business, except as authorized under general agreement.

The expenses of the bureau were to be divided on gross earnings on the traffic, the chairman to make monthly drafts on estimated expenses and furnish monthly statements of immigrant business.

The advisory committee was appointed and met December 5, 1893, in conference with General Eastern Passenger Agents.

On December 6, 1893, the advisory committee met in conference with the representatives of the immigrant or first ward agents of New York city, then in charge of immigration business under the direction of the Secretary of the Treasury. These immigrant agents were willing, on the basis of the continuance of a 20 per cent commission, with limit of \$2.50 on Missouri River and St. Paul, North and South Dakota, Kansas and Nebraska, to Colorado line, and corresponding basis beyond, to co-operate with the Western Passenger Association under the proposed plan.

On December 7, 1893, another conference was held by the advisory committee with the immigrant agents, at which, for the immigrant agents, a delegate announced they were as much in earnest as the association could be to have the business on a basis profitable to all, and accepted the proposition for the abolition of "split orders," or orders for transportation to any other than final destination.

A joint agent was agreed on, to be located in the first ward convenient to the immigrant agents, and an assistant to be located on Ellis Island.

On December 9, 1893, another conference with the immigrant agents was held, in which the latter protested that the arrangements could not be extended to the steamship lines, as this would

10 I. C. C. REP.—2.

leave no profit to them, and that it would be necessary to confine the arrangement either to the immigrant agents or the steamship companies.

A conference was held with representatives of steamship lines to see if they were prepared to enter into any arrangement with association lines on January 1, 1894. The steamship lines were of opinion arrangements should be made with them instead of the immigrant agents, but were not in position to take concerted action in time, and the advisory committee concluded to make the arrangement with the immigrant agents and pay no commissions to any steamship line.

Notice was given as provided, and the immigrant agents pledged themselves to carry out the provisions of the agreement, and placed themselves on record by signing an agreement setting out the terms. The steamship lines of Philadelphia and Baltimore were also conferred with and, it was understood, placed on same footing as those of New York.

Under the above conditions the new system was inaugurated, but it was not till 1897 that the present machinery including the steamship lines was brought into full harmony and working order.

These Trans-Atlantic Steamship Lines, the Immigration Bureau of the Western Passenger Association, the Canadian Pacific Railway Company, and the Southern Pacific Company then entered into an agreement, effective December 1, 1897, by which the steamship lines agreed to deliver to the joint representative of the bureau designated by the routing committee all west-bound passengers holding immigrant rail orders landed at all Atlantic ports, except Portland. If routed originally by coastwise steamship lines, immigrants were to be forwarded as booked, but if destined to points beyond the eastern termini of Western lines they might be routed by the committee. If routed by a line different from the original booking, the line receiving the passenger was to pay the agreed commission to the steamship line and settle at the net rate, regardless of the original routing designated in the order. The steamship lines having agreed to deliver all such passengers holding immigrant rail orders to the said rail lines, they also agreed to take at once all necessary steps to control all such traffic; to the dismissal of any of its

10 I. C. C. REP.

agents who might even attempt to divert the business from the agreed channels. All parties agreed not to permit passengers holding immigrant rail orders to be converted to first or second class passengers for the purpose of taking them from under control of agreement. The rail lines agreed to pay ten per cent commission upon the through rate from New York to destination to the steamship lines, and to no other line or party outside the agreement. This commission allowance from the bureau is upon all immigrant business, including individual rail orders, except those of the Southern Pacific Railway Company sold in their foreign agencies.

The steamship lines agreed to accept no commissions from any outside party, and to accept none in excess of the agreed percentage from any party to the agreement, and undertook to secure a schedule of commissions to booking agents uniform through all Atlantic and Gulf ports, and to book immigrant steerage passengers through to destination. Exception was made in favor of the Canadian Pacific Railway Company and the Southern Pacific Company, with their foreign offices, who were permitted to continue the use of their own tickets, but not allowed to secure by this means an undue proportion of the traffic. No rail orders were to be used, except to final destination, so as to prevent the use of split orders.

It was agreed that a joint conference was to be called to deal with alleged violations or threatened interference; parties agreeing not to enter into any agreement with outside parties. The agreement taking effect December 1, 1897, was to remain in force, except under a 30 days' notice of withdrawal; and it was expressly understood that the withdrawal of one or more was not to be considered a cancelation of the general agreement.

The Canadian Pacific is not a member of the association, but is counted in the distribution of business, and is not protesting. Neither is the Southern Pacific Company a member directly, maintaining its own agencies abroad and an agent at Ellis Island, but is given its proportion of the traffic. The proportion of the California business to which this road is entitled under the agreement is 27½ per cent, and on this basis it co-operates with the association to secure their common interests.

The rules of the Immigrant Bureau, under which it is now operating, are dated July 1, 1899.

Under these it is announced that the object of the bureau is to secure foreign immigrants and forward them according to the best interests of the immigrants and the lines. Any line in the territory to be permitted to join the bureau by subscribing to the rules, and with the consent of all other lines.

That the traffic includes all west-bound Trans-Atlantic steerage passengers landed at Atlantic, Canadian and St. Lawrence ports who within 30 days pass through territory of or competitive to that of the lines which are parties to the agreement, as well as all other steamship passengers with immigrant rail orders destined for, or through, said territory.

The bureau to be administered by an advisory committee of seven, of which five members shall belong to the Western Passenger Association and also the Bureau, and two may be of outside lines.

The Chairman to pay authorized commissions, render monthly statements to the lines for their proportion of such commissions; and prompt remittance is to be made by the lines to the Chairman to cover such commissions.

Necessary expenses are to be apportioned among lines according to gross earnings on this traffic. An office to be maintained in New York, with a general agent appointed by the chairman. The Committee to provide for European supervision, subject to agreement, and to arrange with steamship lines for handling of bureau orders showing all its rail lines; traffic statistics are to be furnished by the Chairman at stated intervals. Split orders are forbidden. Each line to do all it can to aid Chairman, and any line may withdraw on thirty days' notice to the Chairman.

The steamship lines maintain agencies in foreign emigration centers and sell tickets to destination, collecting in Europe not only ocean fare, but also for the railroad ticket from New York or other port to the point desired to be reached by the immigrant.

This system is compulsory under the laws of Denmark and Italy. In these steamship offices abroad the steamship companies are required, under our statute, to post copies of our laws

governing immigration, and they collect from the immigrant the full amount of fare, ticketing the business for the West through the Immigration Bureau agent, giving an order for the railroad ticket to the immigrant in the shape of a coupon attached to the manifest or slip.

On arrival the immigrants are placed on a barge and sent to Ellis Island, where they are inspected by agents of the Immigration Bureau, first running the gauntlet of a half-dozen experienced physicians detailed by the Marine-Hospital Service, under the direction of the Immigration Bureau, who are so expert as to be able to pass upon as high as 800 steerage passengers in an hour and, even under the more rigorous methods lately introduced, easily dispose of 500 in an hour.

Those not held in the detention wards for friends or deportation, or further inquiry, and destined for far western points—about 10 or 12 per cent of those entered—are passed before the agent of the Immigration Bureau of the Western Passenger Association, who has been granted space and a booth by the Commissioner of Immigration since 1894, and who inspects their manifest or order from the steamship company, noting the final destination, and marks on the side, in blue pencil, the route over the Western lines from Chicago or St. Louis over which tickets are to be furnished them. The immigrants are then passed to the Immigration Clearing House agent representing the Trunk Lines, who tears off the coupon order for rail tickets and returns the remainder of the slip, which has now only a historical value to the immigrant, and furnishes him a ticket over one of the Trunk Lines to Chicago or St. Louis, and from either of these points to destination via the route indicated by the agent of the Western lines, and on this ticket his baggage is checked through to the end of his route.

It appeared from the evidence that where an immigrant is familiar with our roads or has a choice and demands a ticket over a certain route, his request is complied with; that, as a rule, the immigrants are in absolute ignorance of our geography or railroad system, and that only a nominal per cent have information or express any choice.

If not too late in the day, the immigrants are collected for a given route, furnished with a bag or two, or more, according to 10 I. C. C. REP.

distance, containing bread, sausage, fruit, etc., all weighed and stamped with price, under contract with and by direction of the Government, taken by barge to the initial terminal line and started on their journey the same evening, without landing in New York or being in any way exposed to the wiles and dangers and expense of a night in a strange city, while the local part of the city is spared the congestion and confusion of a horde of poor and wandering aliens.

Middlemen get business to some territories yet—as to California, Colorado and Utah—where some months they secure as high as 30 per cent of the immigrants, though in some other seasons not above 10 per cent. There is no inducement for them to interfere, except where the fare is high enough to make the commission percentage profitable; they pay no attention to short-distance immigration traffic.

The middleman secures this traffic by paying a commission in Europe, the emigrant buying from the steamship company only a ticket to New York, and from the middleman's agent an order on the middleman in New York for his railroad ticket, or brings instead a letter to the middleman and buys on this side, through the middleman, a ticket to his final destination; but in this case he is billed only to New York. If the immigrant announces a destination beyond New York, he is detained by the immigration authorities on Ellis Island until he is furnished with a ticket. It may be sent in from the outside; they are indifferent to its source or route, but he is not released until he is provided with a railroad ticket to the point to which he has announced his intention of proceeding.

The steamship companies forbid their agents to sell any tickets through middlemen, or through any parties save the Association representative or the Southern Pacific agent, under penalty of removal.

For more than a dozen years the Trunk Lines have, under mutual agreement, apportioned this business as nearly equally as might be. Normally, the nine lines would receive each one-ninth of the immigrant business, but each line makes full returns once a month on all through passenger business to the central office, and the immigrant business is used to restore the equilibrium; as where any line failed to secure its proportion of regular

passenger traffic, the deficiency is made up by forwarding by that line a greater percentage of immigrants, of which, in this territory, there is always ample to make good any shortcoming of revenues from domestic passenger traffic.

Since the passage of the Act to regulate commerce there has been no money pool, nor are deficiencies made up by the payment of money differences; the arrangement of distribution is a purely physical one, the immigrants being forwarded in equal proportions by the various Trunk Lines if their domestic through passenger business has been, approximately, proportionally divided. If any road or roads show a falling off from their average of general through passenger business, the percentage of immigrant traffic through their territory is only distributed to the extent of making their proportion good, and when that is accomplished it is equally distributed as before. In 1901 above 200,000 immigrants were handled through this territory.

Beyond the termini of the Trunk Lines the equal division is adhered to as closely as possible. As an instance, there are between Chicago and St. Paul a half-dozen lines, and each line is given one-sixth of the immigrant traffic between those two points. From St. Louis and Chicago to Missouri River points eleven lines divide equally the immigrants through that territory.

In the ten years ending, June 30, 1903, there arrived in the United States above 4,000,000 immigrants, of which more than 3,000,000 entered at the port of New York or between 75 and 80 per cent. The annual arrivals in that period were as follows:

Total Immigration, U. S.		At Port of New York.
1894,	285,631	253,586
1895,	258,536	219,006
1896,	343,267	263,709
1897,	230,832	180,556
1898,	229,299	178,748
1899,	311,715	242,573
1900,	448,572	341,712
1901,	487,918	388,931
1902,	648,743	493,262
(11 mos.) 1903,	758,225	557,863
	<hr/> 4,002,738	<hr/> 3,119,946
		77 % at N. Y.

The Assistant Commissioner of Immigration was before the Commission and was very positive in his testimony in approval of the present system of handling immigrants by the railroads, and in condemnation of the methods formerly in vogue, when without restrictions the immigrants were at the mercy of the boarding-house keepers of New York and other ports and centers, and referred to conditions "prior to 1886, with its horrors," which he characterized as a "national scandal." Speaking for the Commissioners of Immigration and their assistants, he said that they believed, since the adoption of later methods, that the best interests of the immigrants had been conserved; corruption of employees and abuse of immigrants prevented, and since 1895 the immigrant boarding houses had gone out of existence; that immigrants are better treated, their interests safeguarded, and that both Commissioners gave these associations their absolute sanction and support; that they have always been able to rely on these agents for prompt and accurate report of every immigrant intrusted to their care, which cannot be had of immigrants going to New York; that since 1894 he did not remember a verified complaint.

There seems to be no question of the great improvement in the last ten years in the business of handling the immense numbers of immigrants landing at Ellis Island. The conditions have been bettered for the admitted alien, in that he is taken care of, money exchanged, food for his journey furnished, tickets supplied, and he is promptly started on his way, protected from any designing outsider, and all under the supervision of Government officials. The interests of morality and good government have been subserved, in the breaking up of corruption in the service and the bribery of officials, and in the more certain enforcement of the contract labor laws than could be accomplished under the old system where the immigrant was lost in New York.

The service of the Immigration Bureau of the Treasury Department has been bettered by enabling it to keep in touch with the individual immigrant until he reaches his final destination—impossible under the old methods, and yet in no other way can the contract labor law be properly executed and violations detected. It is contended that, notwithstanding these facts the

practice of apportioning immigrants among the lines is unlawful, and it may be that the advantages to the public and the immigrants in the present methods of handling them could be retained without such apportionment of this traffic.

Section 5 of the Act to regulate commerce provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense."

It will be seen that it was deemed by the authors of the Act essential to provide specifically against a division of freight in kind, as well as against the pooling or division of the earnings therefrom, but for some reason they did not provide against a division of passengers between competing roads. The omission to do the latter while doing the former would seem to indicate that it is not improbable that they deemed the general prohibition in this section against a division between them of the aggregate or net proceeds of the earnings of such railroads, or any portion thereof, would be sufficient to prevent any known or probable method of pooling passenger traffic that was or could be made effective.

The understanding and intent of legislators may sometimes be gathered from their expressions in debate while the measure is under consideration; and while these are but individual opinions upon construction of language and serve in no case to lend an interpretation or color not consistent with the actual terms of the law, are of service in illustrating the wrongs to be cured and the aims of those who seek to right them.

The general feeling against pooling arrangements was very bitter immediately preceding and at the time of the passage of the act. So obnoxious had some of the more aggravated of these conditions become that they were not only severely denounced on several occasions, but the States had been awakened to action against them both in their constitutions and in their courts.

10 I. C. C. REP.

A list of some of the more important pools was given by the author of the Reagan bill in July, 1886, in his presentation of the necessity and purposes of the proposed act for railway regulation. Included in the list was one dated 1879 and another 1885, both of which provided or guaranteed a fund to maintain a pool having for its object the control or division of the west bound passenger traffic as well as of freights, and there was indication that the subject of passenger pools was at least under consideration. Whether the language as finally adopted accomplished the purpose of forbidding all pools, freight or passenger, was a matter upon which there was even then division of opinion.

In the debate upon the conference report of the two Houses of Congress, a representative from Iowa (Mr. Weaver) insisted that the language of the section referred to freight pools, while a representative from Georgia (Mr. Crisp) was as firm that it also applied "if it were the pooling of passenger fares." "But," he added, "did the gentleman ever know of a passenger pool?"—as if it were useless to strive over a theoretical situation.

It seems clear to us that the section quoted forbids a division of "the aggregate or net proceeds of the earnings of such railroads or any portion thereof" of competing carriers, whether such earnings arise from freight or passenger business, and that it also forbids a division of freights in kind by any device. But it is not clear that Congress did not regard the division of the passenger traffic in kind as impracticable, and, therefore, not necessary to include within the prohibition. Nor is it believed that such a practice exists or could be made effective in respect to any other class of passenger business, except that of immigrants; and while, as shown, the arrangement under discussion purports to be for the division of west-bound passenger traffic, including domestic as well as immigrant, it is also apparent that in its operation there is practically only a distribution or division of the immigrants which, however, is based upon the proportions of the domestic traffic done by each line. This arrangement is no doubt in restraint of competition, and if the question of the reasonableness of the rates was under consideration would have bearing upon that question; but there is no division of the aggregate or net proceeds, or any part thereof, between the lines, un-

less, as is contended, the division of passengers before they have been carried is, in contemplation of law, a division of the earnings therefrom. Against this contention is the fact that there is specific prohibition against the pooling or division of freights and the omission of a like specific provision in respect to passengers. In view of this fact and the further fact that the things forbidden by this section of the act are made criminal, it is doubtful, at least, whether such a division of the passengers as has been shown to exist under this arrangement is covered by the prohibitions of this section. If the practice was effective in respect to domestic business so as to indicate that it might become extensive, we might feel constrained to resolve the doubt against the practice in an effort to up-root it, for it must be conceded that if it were practicable to make effective such arrangements in respect to all, or a large part of the domestic passenger business, what we understand to be the purposes of the law would be largely defeated; but, as above indicated, it is not believed that it can ever be made effective to any considerable extent in the domestic passenger business and it is not improbable that this is the reason that this section was framed as it is.

The circumstances and conditions of this immigration traffic were not considered by the framers of the act at the time of its passage. Out of it there appears to arise no injustice to domestic shippers or passengers unless by it there be restraint of competition resulting in higher passenger rates than would otherwise prevail. While large in the aggregate it is insignificant in comparison with our general traffic, only ten or twelve per cent passing beyond the western termini of the trunk lines. There is no discrimination as against individuals, classes or localities since the immigrants are forwarded at domestic published rates. From the view-point of expediency there would seem to be no cause for interference in the hope of righting any great wrong to individuals or interests or in creating a better condition for the immigrants themselves, or in respect to the importation of diseases or undesirable immigrants. These considerations would, perhaps, have no place in the determination of the matters involved if the law was free from doubt, it being our duty to enforce the same as it is found.

10 I. C. C. REP.

Without, however, undertaking now to determine the doubtful question of law involved, we feel clear that, upon the facts and considerations appearing, we are not justified at this time in making any order in the premises.

10 I. C. C. REP.

No. 609.

G. C. PRATT LUMBER COMPANY
v.
CHICAGO, INDIANAPOLIS & LOUISVILLE RY. CO.

Decided January 27, 1904.

Defendant charges on lumber to Boston and Boston points a higher rate from Sheridan, Ind., a non-competitive point on its road, than from Indianapolis, Ind., although the latter is the longer distance point by its line, which runs north from Indianapolis through Sheridan to Michigan City, Ind., and connects at various points with lines to Boston and other eastern localities. Indianapolis is a competitive point and numerous lines run from that city both east and west. The short lines from Sheridan to the east are through Indianapolis, and by those lines Sheridan is a longer distance point. Indianapolis takes 93 per cent of Chicago rates to the east, and Sheridan, though claimed by complainant to be in 93 per cent territory, is charged 100 per cent, or Chicago rates, by the defendant. The rates to Boston and Boston points at the time of complaint were 27 cents per hundred pounds from Sheridan, and 25 cents from Indianapolis; but they have since been reduced to 26½ and 24½ cents, respectively. The circumstances and conditions governing the traffic from Sheridan are substantially and materially different from those applying on the traffic from Indianapolis.

Held, that no undue discrimination results to Sheridan because by defendant's indirect route the rate is 2 cents less from Indianapolis than it is from Sheridan.

Frank J. Lahr for complainant.

G. W. Kretzinger for defendant.

P. J. Farrell for the Commission.

REPORT AND OPINION OF THE COMMISSION.

CLEMENTS, *Commissioner*:

The complainant in this case, a corporation organized under the laws of Indiana, with its principal office at Indianapolis, is a buyer and shipper of hardwood lumber which it ships from
10 I. C. C. REP.

Sheridan, Ind., to markets in other parts of the United States, including New York and Boston, and alleges that the defendant is a common carrier, with its connections, between said points, and subject to the Act to regulate commerce; that upon the shipment of four cars of lumber of various weights, dates, and destinations, from Sheridan, complainant suffered an overcharge of 2 cents per hundred pounds, not over the published rate, but by undue discrimination; that the rate from Indianapolis is 25 cents per hundred pounds upon lumber to said eastern points, while from Sheridan, the shorter distance point on the same line, the rate is 27 cents per hundred pounds in violation of the Act to regulate commerce, subjecting Sheridan, its locality, business and inhabitants to undue and unreasonable prejudice and disadvantage. The complaint concludes with a prayer for reparation, and for an order that defendant cease and desist from said violations.

The defendant in its answer admits the principal allegations of the complaint as to shipments and rates, but avers that shipments from Sheridan cannot be routed to Boston points as to New York, Philadelphia, or Baltimore, but can only be routed to Baltimore, thence by water to Boston; that steamship lines are not prepared to handle bulky freights or lumber above 20 feet in length; and denies, if it had such arrangement, that complainant would have shipped its lumber by that route on the basis of 93 per cent of the Chicago rate, the same being impracticable, requiring extra handling and delay, and Sheridan high class lumber being subject to damage in ocean transit. The defendant further avers that it has never published a 93 per cent rate from these points by the ocean route; that all points north of Indianapolis take the Chicago or 100 per cent rate; that Indianapolis takes a 93 per cent rate, and that if compelled to place Sheridan and Indianapolis on an equality respondent would be forced to increase the Indianapolis rate and would lose its business at that point of sharp competition; and denies any violation of the Act or any extortionate or discriminating rates.

FACTS.

The defendant road has a line from Indianapolis to Michi-

gan City, crossing the eastern lines out of Chicago, with which connections it can make arrangements for through routes and rates to eastern points. Sheridan, the point of complaint, is a station on this line about 28 miles from Indianapolis, from which one or two cars of hardwood lumber are shipped, on an average, per day. The rates upon lumber have been based upon percentages of the rate from Chicago to eastern points, the Chicago rate being taken as one hundred per cent.

These percentages are applied in groups, the dividing line between 100 per cent and 93 per cent, the Indianapolis rate being at or near Sheridan upon defendant's line.

The rates from Sheridan to New York, Philadelphia, and Baltimore, and group points, as well as to Boston and New England points, have heretofore been 100 per cent of the Chicago rate, though from Indianapolis the rate to the same points is 93 per cent of the Chicago rate.

Sheridan is a town of about 1,800 inhabitants, and the center of a limited hardwood lumber industry, shipping one or two cars of lumber per day.

The defendant line, the only railway passing through or near Sheridan, and running through Monon to Michigan City, 155 miles from Indianapolis, has arrangements from Michigan City, its longest haul in connection with eastern lines, on the basis of Chicago rates. Many roads run from Indianapolis both east and west.

Sheridan is the longer distance point by direct line through Indianapolis to eastern destinations, although following the shipment by the defendant's line west and north, Indianapolis traffic would pass through Sheridan to the same destinations.

The particular shipments set forth in the complaint and not disputed were as follows:

Nov. 8, 1900,	carload	49,600	pounds,	Charlestown, Mass.
Oct. 8, 1900,	"	40,500	"	Keene, New Hamp.
Oct. 15, 1900,	"	43,100	"	Boston, Mass.
Oct. 6, 1900,	"	38,500	"	Torrington, Conn.

Upon these cars 27 cents per hundred pounds was charged and collected, the same being the published rate. Up to this point
10 I. C. C. REP.

there is apparently no dispute. The issue presented is the contention by complainant that Sheridan is situated within the 93 per cent territory, and should enjoy the Indianapolis rate of 25 cents per hundred pounds, since, when moving by the same route, Indianapolis shipments at 25 cents must pass through Sheridan, and the denial by defendant that there is any necessary relation of said rates. The defendant declares that no shipments of similar character have ever been made in which Sheridan has been treated as in 93 per cent territory, and that by its only through arrangements with eastbound lines its connections refuse to accept such shipments on any other than a 100 per cent basis.

A map prepared for the convenience of rating committees and shippers, in which the northern middle states are blocked into irregular divisions of territory taking fixed percentages of Chicago rates was in evidence at the hearing. Some emphasis was laid upon the fact that upon this map Sheridan was shown to be just within the 93 per cent territory, and if all other business in that zone was conducted on the basis of 93 per cent of Chicago rates except lumber, it would be such an apparent discrimination against a single industry as to justify complaint, and, unexplained, to demand interference.

This map is, however, not issued by the railroads nor made a part of their tariffs, but is published by a joint inspector located at Chicago, and is not binding upon any road, system, or territory, but used simply as a convenience in the consideration of through rates generally. There are many exceptions to its application. It has no bearing upon the local traffic. In this proceeding it was shown that Sheridan and Indianapolis had the same rates to Chicago, Detroit, and other northern points, but for all traffic from points north of Indianapolis, including Sheridan, destined for Boston points, these divisions have always been ignored, and no instance was shown where any business had ever moved from Sheridan to New England points on the Indianapolis rate, though the 2 cents per 100 pounds added to the through rate is hardly the measure of the local rate from Sheridan to Indianapolis.

The more direct lines charge and receive 25 cents from

Indianapolis, and refuse to accept less on a joint haul from Sheridan. It is clear that a shipment from Sheridan via Indianapolis must include a 28-mile haul to that point, making either a higher joint through rate than the Indianapolis rate, or the defendant's haul to that place must be made without charge. There is no charge that either rate is unreasonably high. The question is one of alleged discrimination only. The rates from Indianapolis appear to be the result of competition between the many lines therefrom to the east; whereas, the rates from Sheridan, a non-competitive place, are not subject to like competition.

In the divisions of joint through rates on percentages based on mileage, as it appears by the testimony the rates in question are, the defendant line naturally prefers arrangements with connections giving it the longest haul and largest percentage: There fore, it carries this freight at rates based on a carriage through Indianapolis by a direct line eastward, while in fact it carries it in an opposite direction north and west by a longer route, the reduced ton mileage being accepted to secure the traffic.

Since the hearing, the defendant has filed a new tariff in which the rates are slightly reduced, the rate now published being $24\frac{1}{2}$ cents per hundred pounds from what were before 93 per cent points, and two cents per hundred pounds additional from points in a group from Monticello to Broad Ripple, including Sheridan. This gives Sheridan a through rate of $26\frac{1}{2}$ cents instead of 27 cents, as under the tariff in force at the dates of complaint and hearing.

For the through rates by connections with other lines the defendant is not alone responsible, but must pro-rate with such connecting lines such rates as may be agreed upon. This the defendant evidently cannot do through Indianapolis to secure either equal rates for Sheridan or any haul for itself save at a loss. The one hundred per cent applied to Sheridan gives it the Chicago rate, though the service includes a longer haul from a side line. The defendant is confronted at Indianapolis with a rate by direct lines to the east, and from that point must carry at no higher rate than the direct and shorter lines; and even if it could effect an arrangement with any of them for joint through rates

10 I. C. C. REP.—3.

from Sheridan through Indianapolis to the east, such through rates might with good reason be greater from Sheridan than those from Indianapolis because of the greater distance and the participation of an additional road necessary to make a through route. If, by carrying freight from Indianapolis in the other direction to a connection to the east, it can secure a larger share as its part of the through rate, and which is not shown to be greater than would be a reasonable through rate by the direct line from Sheridan through Indianapolis, if one were established that way, it does not follow that any injustice or undue discrimination results to Sheridan, because by such indirect route the rate is less from Indianapolis by the amount shown than from Sheridan over the same route.

It abundantly appears that the circumstances and conditions, such as the Supreme Court has decided it to be the duty of the Commission to consider in such cases, are substantially and materially different in regard to this freight moving from these two points, respectively (*Allen v. L. N. A. & C. R. Co.* 1 I. C. C. Rep. 199).

Upon the facts appearing we find no undue discrimination in the adjustment of the rates involved. It follows that the prayer of the complainants must be denied.

10 I. C. C. REP.

No. 634.

THE MAYOR AND CITY COUNCIL OF WICHITA,
KANSAS,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY *et al.*

Decided January 27, 1904.

1. It is the province of the Commission to interfere and secure, if possible, a fair adjustment in cases of unreasonable rates or unjust discrimination; but the Commission has no more authority to place competing millers in different states upon precisely the same footing than it has to equalize conditions in all localities and in every industry.
2. Rates from points in Kansas and Missouri to points in Texas are five cents per hundred pounds higher on flour than on wheat, and such differential is not applied on flour or wheat carried in any other direction. This differential has been the subject of controversy in two previous cases before the Commission, *Kauffman Milling Co. v. Missouri P. R. Co.* (1890) 4 I. C. C. Rep. 417, 3 Inters. Com. Rep. 400; *Railroad Comrs. v. Atchison, T. & S. F. R. Co.* (1899) 8 I. C. C. Rep. 304, and in the decisions of those cases the five cent higher rate on flour than on wheat, as applied on the traffic to points in Texas, was not declared unlawful.

Held, upon the record in this case, that since the former decisions were rendered there has been no such change in conditions governing the traffic as to warrant interference by the Commission.

Messrs. Helm, Ashbaugh and Adams for complainant.

M. F. Clardy and C. E. Benton for Missouri Pacific Ry. Co.

Gardner Lathrop for A., T. & S. F. Ry. Co.

M. A. Low for C., R. I. & P. Ry. Co.

W. O. Littlefield for St. Louis & San Francisco Ry. Co.

P. J. Farrell for the Commission.

REPORT AND OPINION OF THE COMMISSION.

CLEMENTS, *Commissioner*:

This proceeding is based on a petition filed by the Mayor and
10 I. C. C. REP.

City Council of Wichita, Kansas, in which it is alleged that the city of Wichita, its millers, shippers, and merchants are unjustly discriminated against, and subjected to undue and unreasonable prejudice and disadvantage by reason of the rates on flour from Wichita and other points in Kansas and Missouri to points in Texas, being five cents per hundred pounds higher than on wheat—a differential which does not apply on like transportation in any other direction; that this is not warranted by any difference in cost of service, and that any differential operates as an unjust and illegal discrimination in violation of the Act to regulate commerce. The complainant prays for an order directing defendants to cease and desist from publishing and maintaining said differential of five cents per hundred pounds, or from maintaining any differential whatever.

Defendants, in their answers, make statements in justification of the differential between wheat and flour. They allege that a similar differential exists in the State of Texas, established by the Commission of that State; that differences in circumstances and conditions connected with the transportation warrant the difference in rates; that flour is a manufactured article and more valuable than wheat; that, therefore, defendants incur greater risk when they transport flour than when they transport wheat; that the barrel in which flour is packed is carried free, while transportation charges are collected on the actual weight of wheat; that wheat is all raw material, while it takes about 280 pounds of wheat to make 196 pounds of flour, the difference in weight being accounted for by 79 pounds of mill offal, such as bran and screenings, and 5 pounds of "invisible loss;" that, therefore, transportation charges are paid on a much greater proportion of comparatively worthless material when wheat is transported than when flour is transported; that without the differential Texas millers would be unable to compete with Kansas and Missouri millers, except at places where mills are located; and that the milling-in-transit privilege is dependent upon the existence of the differential. Defendants also call attention to the decision of this Commission in *Kauffman Milling Company v. Missouri Pacific Railway Co.*, rendered in 1890, wherein the 5-cent differential was not declared unlawful, and

aver than conditions, if changed, are stronger in support of the differential now than they were at that time.

On application, the Commission, on September 18, 1902, entered an order by which the Galveston Chamber of Commerce and the Texas Millers' Association were granted leave to intervene. An extended hearing was held by the Commission at Wichita, Kansas.

For more than twenty-five years a differential has been maintained between the rates on wheat and flour moving into Texas from points north of that state.

In the earlier years it was several times as great as at present, and even when established at five cents per hundred pounds, the reduction at harvest periods on the transportation of wheat without a like reduction upon flour until some later date would have the effect of increasing the differential by the amount of the reduction upon the grain. All this was reviewed in the former adjudication on this subject of Texas differentials in the *Kauffman Milling Co. Case*. The irregular practices then complained of by which the differences were exaggerated find no place in the present complaint, and it may be assumed the situation is to that extent improved.

The increase of mills in points nearer the wheat producing area, as in Kansas, Oklahoma, and Texas, the increase of population throughout the territory in question, enlarging the Texas market, the almost universal use of the roller mill, the keen competition which has reduced the profits upon flour, the increase of transportation facilities that provide ready means for direct export of both wheat and flour through nearby southern ports—all indicate some changes in the conditions existing at the time the former opinion was rendered when the Commission declined to disturb the five cents per hundred pounds differential.

The facts were then exhaustively collected and the arguments considered for and against the maintenance of the differential. It is unnecessary to again go over this ground, as, in the main, the parties in interest occupy the same relative positions as before. The millers of Wichita and other complaining points contend that without the differential they would be enabled to grind the wheat, near the fields where produced, and ship their

10 I. C. C. REP.

product to Texas, where consumed, to a greater extent than they are now able to do; that on the contrary, the Texas millers, with this advantage, can and do meet them in their own fields and outbid them for their wheat at their own doors, and undersell them with the flour in the Texas markets.

On the general facts there is no dispute, the issue being whether there had been such a change in conditions of population, agriculture, milling industry or transportation in this section as to warrant an interference by the Commission which it formerly declined to make. The differential rates on wheat and flour to Texas points have been long in operation. In the *Kauffman Milling Co. Case*, in 1890, these had already been in effect for some fifteen years, in the earlier years being much higher than the five cents now the subject of complaint.

The Kansas millers contend they are shut out of the Texas market by flour made with Kansas wheat; that Texas does not grow enough wheat for home consumption, and that the larger mills in Texas with greater capacity enable the Texas millers to come into Kansas and compete for the wheat, which they are able to get and grind cheaper than the Kansas millers can get the flour to Texas markets; that the Texas millers can overbid for Kansas wheat and thus advance its price, and that Kansas products are thus thrown out of line, which works injury to complainant, not only in Texas, but in the general market.

Texas mills export some flour; make some sales even in the southern portion of Indian Territory. Territory mills complain they must go outside and ship some wheat in on the flour rate, while Texas comes in and ships their wheat out.

On the other hand, the Texas millers contend that in the shipping of wheat they are paying freight on offal and invisible loss, while in the shipment of flour in barrels the package is carried free and that the differential of five cents per hundred pounds is insufficient to enable them to fairly compete with their rivals and that the difference between the rates on wheat and flour should be greater than five cents.

The value of flouring and grist mills in Texas in 1890 was \$9,903,455, in 1900, \$12,333,730, and the testimony indicated a large increase since the last census year, encouraged by the ex-

traordinary wheat production of 1900, reaching that year 23,395,913 bushels, more than double its average production.

Kansas, too, showed an increase in the value of the mills from \$17,420,475 in 1890 to \$21,926,768 in 1900.

This increase in the milling capacity of points situated nearer the wheat fields was bound to affect the industry at more remote places, and we are prepared to find the value of mills in the state of Missouri falling from \$34,486,795 in 1890 to \$26,393,928 in 1900.

In 1900 the product of the Texas mills was above two and a half million barrels; of the Kansas mills above five million barrels, and Missouri produced but little more.

The argument that the Kansas milling industry had grown up under the operation of the five cents per hundred differential, and had kept pace with the growth in Texas, and almost equalled the capital and capacity of the Missouri mills, and therefore that the differential could not be a serious drawback is unfair. If the only outlet for Kansas flour was the Texas market, that might be a natural inference; but the markets of the world are open, and such Kansas millers as testified at the hearing of the case declared they had little or no trade in Texas, and for the most part found sale for their products, after local distribution, in the markets of the east.

The differential of five cents a hundred pounds is equivalent to ten cents upon a barrel of flour. This, it appeared from the testimony, was a measure of the profit upon much of the surplus of the mills. But it does not follow that five cents per hundred pounds differential upon flour places Kansas flour in the Texas market ten cents a barrel higher than the product of Texas mills. There are many other elements to be taken into consideration: the price of Kansas wheat as compared with Texas wheat or that from other markets; the relative proportions of the amount of flour, bran, and waste in the wheat so shipped; the relative efficiency of the mills in the various localities; the relative cost of labor and fuel in the two states, and the relative value of the by-products at the mill door and in nearby markets.

All these elements, none of which are fixed, render it impossible to adjust the rates alone in such manner as to equalize the 10 I. C. C. REP.

conditions of manufacture, if that was the purpose of the Commission. It is no more the object or duty of the Commission to place the competing millers of these states on precisely the same footing, than to equalize conditions in all localities and in every industry—an undertaking clearly beyond their powers.

If the rates are exorbitant, oppressive, and unreasonable, or if the discriminations are unjust and work hardship, it is the province of the Commission to interfere and secure, if possible, fair adjustment.

Most, if not all, of the millers who testified for the complainants at this hearing had engaged in the business at their present location since the *Kauffman Milling Company Case* was heard in 1890, and had therefore found this differential of five cents per hundred pounds upon flour in effect when their investment was made, and continued ever since. This is not in the nature of a vested right, and if it is an undue preference, carrying unearned profit in one direction and undeserved damage in another, it cannot be too soon interfered with.

The following table shows the rates in force at the present time from Wichita and sundry points in Oklahoma and Indian Territory to points in Texas, both on domestic wheat and flour and that for export:

10 I. C. C. REP.

10 STATEMENT SHOWING RATES ON WHEAT AND FLOUR FROM WICHITA, KAN., AND
C. C. REP. OKLAHOMA AND INDIAN TERRITORY POINTS TO TEXAS POINTS. ALSO FROM
WICHITA TO TEXARKANA, ARK.

Rates in cents per 100 pounds.

To	Texarkana, Ark.		Fort Worth, Texas.		Houston, Texas.	Galveston, Texas.				Texas Com- mon Points in Group 4.	
	Wheat.		Wheat.		Wheat.		Domestic.		Export.		Wheat.
	Flour.	Wheat.	Flour.	Wheat.	Flour.	Wheat.	Flour.	Wheat.	Flour.	Wheat.	
From											
Wichita, Kan.	28½	29½	38	38	45½	40½	45½	40½	30½	30½	40½
From A. T. & S. F. Points.											
Oklahoma City, Okla.	---	---	37	32	48½	38½	43½	38½	30½	30½	38½
Purcell, Ind. T.	---	---	34½	29½	40½	35½	40½	35½	27	27	35½
Pauls Valley, "	---	---	80½	25½	32	29	32	29	22	22	29
Ardmore, "	---	---	28½	23½	29	26	29	26	15	15	23
Thackerville, "	---	---	25	22	25	22	25	22	15	15	26

The higher rate upon flour is sought to be justified by those who contend for its continuance upon the ground that it has a higher value than wheat, that less flour is carried in a car, and therefore productive of less revenue than wheat; that the barrel package is carried free, while the transportation of wheat entails the payment of freight, not only on the cheaper by-product bran, but upon a certain percentage of waste which disappears in the cleaning processes called "invisible loss;" that the higher value of flour and its liability to damage render risks greater, claims for damage and loss more numerous, and that it is only consistent with the almost universal rule that there should be a higher rate upon the finished product than the raw material.

Yet all these arguments are as potent in one direction as another, and would apply, if at all, to the transportation of wheat and flour in any direction for any purpose, yet no differential was shown to exist between wheat and flour carried west, north, or east, and the latter marks the line of greatest shipment, and over the defendant lines to the last station on the Gulf if the wheat and flour are marked for export they go at the same rate.

It is true that water competition controlling conditions surrounding export traffic makes such rates and differentials independent of ordinary traffic and useless for purposes of comparison, but so great a portion of the domestic wheat and flour of the United States is carried at the same rate as to indicate there is no striking difference, all things considered, in the revenues they yield the railroad or in the expense of carriage.

The estimate generally accepted in the trade is that four and one-half bushels of wheat are required to make a barrel of flour, and the per capita consumption is usually placed at five and one-half bushels of wheat annually, though, of course, this varies somewhat with habits, price and plenty.

The population of Texas has increased since 1890 about fifty per cent; the production of wheat has increased in as great ratio, and this with the unprecedented crop of 1900 of above twenty-three million bushels, led to the erection of flouring mills beyond and after the reports of the census year, until the estimate of witnesses that the capacity of Texas mills had doubled since 1890 is well within the bound of probability. So much of this

increase in milling capacity as grew out of and depends upon a wheat yield like that of 1900 is likely to prove disastrous, since the very next season the Texas crop had fallen to less than one-third that of the banner year, which was beyond its needs for home consumption.

For the last two years one-half or more of the bread needed for the Texas market was imported in the form of wheat and flour.

In the testimony submitted in support of the contentions of complainant, it was sought to establish the fact that the Texas millers in buying wheat in the territory claimed by the complaining millers conducted so fierce a competition as to appreciably raise the price of grain in their own markets, and that this resulted in disturbing the natural relation of prices to such an extent as to prove a handicap when they, the Kansas millers, endeavored to dispose of their products in the open markets elsewhere than Texas, by reason of the disproportionate price they were compelled to pay for their raw material.

This was at least not entire loss to the state, since the farmers received the benefit of the increased prices, and of itself is not a strong argument for interference. Anything which increases the value of the products of the soil to the producer seems so desirable a result, that if the Commission was endeavoring to adjust the conditions investing various localities, that which led to the prosperity of the agriculturist must receive favorable attention.

It was suggested that the exploitation of the southern oil field had placed at the disposal of the Texas millers a fuel which enabled them to manufacture flour at one-half the expense of their competitors, and gave them a further advantage in the contest for that market; but as before observed, it is beyond our province or power to exactly equalize the conditions of business in various parts of the country by such an adjustment of rates as to place every industry on the same footing, nor can we ignore the serious claims of any individual business or locality for relief, and therefore even so apparently remote an advantage as cheap fuel demands consideration.

The expense of fuel in the manufacture of flour was placed at 10 I. C. C. REP.

approximately five or six cents per barrel, but, of course, must vary with locality, efficiency, and the ability to run full or half time. It was declared by one of the witnesses that the failure of the self-flowing wells at Beaumont, the consequent rise in price of oil, and the tremendous advance in the price of transportation of oil, had greatly reduced the profit in its use as fuel.

**DISTRIBUTION OF WHEAT IN TEXAS AND KANSAS,
AS ESTIMATED ON MARCH 1, 1891 TO 1903.**

CROP YEAR.	TEXAS.			KANSAS.		
	Production.	Consumed in County where grown.	Price on Dec. 1.	Production.	Consumed in County where grown.	Price on Dec. 1.
	Bushels	Bushels	Cts.	Bushels	Bushels	Cts.
1890	3,575,000	2,895,750	95	28,195,000	13,533,600	77
1891	6,435,000	5,019,300	87	54,866,000	23,043,720	73
1892	5,475,000	4,325,250	75	70,831,000	19,124,370	52
1893	4,533,000	3,490,410	58	23,252,000	6,510,560	42
1894	6,893,000	5,031,890	54	35,315,000	13,419,700	44
1895	2,082,000	1,519,860	66	22,919,000	11,001,120	45
1896	4,529,210	4,076,289	75	30,794,452	15,397,226	63
1897	7,028,251	4,919,776	89	47,998,152	16,799,353	74
1898	9,348,464	6,917,863	68	64,939,412	19,481,824	50
1899	9,044,635	6,964,369	68	36,468,044	13,493,176	52
1900	23,395,913	14,271,507	64	82,488,655	20,622,164	55
1901	6,062,021	5,698,300	78	99,079,304	31,705,377	59
1902	8,633,277	7,769,949	77	45,827,495	16,497,898	55

There is an apparent anomaly in the condition which places a differential of five cents per hundred pounds upon flour above wheat from the northern border states into Texas, and practically in no other direction in the United States, which would seem to warrant interference. But it must be remembered that the practice elsewhere of applying the same rate to wheat and its product is exceptional in view of the customary practice in regard to other articles. Subject to certain exceptions, it always has been the rule to make transportation charges higher upon the manufactured product than upon the raw material.

A glance at the table of production of wheat in the states of Kansas and Texas since the hearing by the Commission in the *Kauffman Milling Case*, will readily suggest the principal source of the embarrassments of the milling interests in both states.

Texas raised an abnormally large crop of wheat in 1900, with the inevitable result of stimulating the erection of mills and reducing the comparative farm prices, and it will be seen that the difference of the farm price of Texas wheat below that of Kansas wheat was lower than it had ever been.

Kansas wheat sold for 55 cents per bushel on the farm and Texas wheat for 64 cents, a difference of only 9 cents per bushel, though since 1890 Texas wheat had sold on the farm at an average of above 16 cents per bushel more than Kansas wheat.

In 1900, Texas with 23,390,913 bushels and Kansas with 82,488,655 bushels, gave the competing mills of these states 105,884,568 bushels. The following year of 1901, Kansas raised its greatest crop, above 99 million bushels, and though Texas fell to but little over 6 million bushels, the joint stock of wheat in both states still aggregated 105 million bushels, about as much as for the great Texas crop year, from which the millers of these states might draw supplies.

In 1902, however, the Kansas crop fell to 45,827,495, and Texas produced but 8,633,277 bushels, or a joint production of only 54,460,772 bushels, but little more than half the supplies of the two preceding years, with an increased milling capacity in both states. It was inevitable that the competition of purchasers should be fierce, that each must go further afield for supplies, that some mills must find difficulty by reason of reduced supplies and narrower margins, in securing sufficient wheat to grind full time, or sales for their products at accustomed profits.

This accident of the annual crop yield amply accounts for the strain upon the flouring mills of both sections, and besides this there is comparatively little or no change in the conditions existing at the time when the question of differentials was before under consideration. In November, 1899, in the case of *Railroad Comrs. v. Atchison, T. & S. F. R. Co.* 8 I. C. C. Rep. 304, the Commission reviewed the *Kauffman Milling Company Case* and found "that it did not appear in the present proceeding that 10 I. C. C. REP.

any new conditions had come into existence, or that old conditions had been essentially modified." "In the absence of some showing that new conditions have intervened, or that the effects of the original holding have been other than were anticipated, we think that that case must control the disposition of this." No change of such importance has occurred as to warrant an interference at this time which would not as well have been justified then, and the Commission must, therefore, hold to its former opinion and decline to disturb relations of rates which as recited in the former opinion, could scarcely fail to be injurious to important vested rights.

10 I. C. C. REP.

[No. 663.]

JOHN H. PARKS
v.
THE CINCINNATI & MUSKINGUM VALLEY RAIL-
ROAD COMPANY.

Decided January 30, 1904.

Complainant alleged unjust discrimination by defendant in failing to furnish him with cars for the shipment of grain while supplying more than a fair proportion of cars to a competitor doing business in the same town, and that defendant subjected him to unreasonable disadvantage by providing his competitor in the coal business with a private switch and denying the like facility to him, thereby compelling him to unload coal at an inconvenient point near the outskirts of the town, and demanded reparation. It appeared that complainant desired to ship grain mainly to eastern points, concerning the transportation of which an embargo had been established by eastern lines, while his competitor in that business shipped largely by defendant's line to local points, for which complainant had no shipments, and that as to the coal business complainant really desired to use a passing siding of defendant for the purpose of unloading his coal. Upon these and other circumstances shown in the case, *Held*, That there was no such showing of undue preference or unjust discrimination as would warrant an order of relief or for reparation.

P. J. Farrell for the Commission.

A. P. Burgwin and *F. A. Durban* for defendant.

REPORT AND OPINION OF THE COMMISSION.

FIFER, *Commissioner*:

The complaint in this case states that the complainant is a dealer in grain and seeds at New Holland, Ohio, engaged in shipping said commodities to various markets in other states,
10 I. C. C. REP.

and also engaged in the shipment of coal to New Holland for sale at that point, and that defendant is a common carrier to and from New Holland and subject to the Act to regulate commerce.

Complainant alleges unjust discrimination by defendant in failure to furnish cars for the conduct of his business, while furnishing a competitor in the same line more than his fair proportion, through which preference and discrimination complainant suffered damage and loss to the extent of four hundred dollars. Complainant further alleges that the defendant unloads coal for a competitor at a convenient point and forces complainant to go to the outskirts of the town for his coal, an unreasonable regulation and a hardship, furnishing his competitor with a private switch and refusing a like concession to complainant, illegal practices in violation of the Act.

The defendant, in its answer, admits it is a common carrier subject to the Act, but avers its road is wholly within the state of Ohio; admits complainant is a dealer in grain and seeds, shipping to other markets; admits there are two elevators of about the same capacity, and that between Nov. 10, 1902, and Feb. 1, 1903, complainant used thirteen cars furnished by defendant, and that the competing elevator used fifty-five cars in the same period; admits the complainant deals in coal at New Holland, and that defendant's agent, John E. Ferrell, is also a coal and lumber dealer, and that he has been long in the business, and that before complainant began, said Ferrell leased property from defendant's predecessor, the Cincinnati & Muskingum Valley Railway Company, upon which he erected buildings and coal bins, whereupon defendant's predecessor constructed a side track thereto; that complainant has a point at New Holland for the general delivery of coal where coal is delivered, and that complainant receives no coal from points outside the state, and ships none. Defendant denies any discrimination against complainant, and avers he was treated as well as other shippers.

FACTS.

The complainant, about 1896, came to New Holland and purchased a grain elevator, paying therefor above \$3,000. He also expended nearly as much for remodeling the same. The capac-

ity of the elevator is from 20,000 to 25,000 bushels. This elevator is situated alongside the line of the defendant road, a siding where cars are loaded, the same being a "passing siding" of defendant company.

Nearby is an elevator of about the same dimensions, owned and operated by a competing firm, McCrea and Vlerebome. This elevator, situated a short distance from the main line, has a short spur siding on which it receives and loads its grain cars. This competing firm, by reason of having been engaged in the operation of an elevator at this point two or three times as long as complainant, or by the use of greater capital, or longer acquaintance, or more popular business methods, or greater enterprise, or seeking of local markets instead of depending principally on sales in eastern states, or a favoritism which secures to them from defendant road greater accommodations in the matter of cars furnished for the shipment of grain, or all of these, has, by the undisputed testimony of all the witnesses and the records, managed to control and handle the greater proportion of grain elevated and shipped from this point, for the last six years, and indeed, before the advent of complainant.

For a couple of years, beginning in 1899 and terminating in 1901, the two elevators were operated under a mutual agreement by which each paid the other one cent per bushel for the grain handled, under which system it became less material who received the cars or shipped the grain, as each participated in the profits. During that period there seems to have been little complaint of discrimination in the matter of cars furnished, but the testimony tends to show that the so-called Vlerebome elevator continued to handle the larger portion of the grain business at that point. Based on proportion of cars used by each for a series of years, the agent of the defendant road claimed to furnish to the respective elevators, cars in the proportion of four to McCrea & Vlerebome, to one given complainant.

In the year 1901, according to the testimony of defendant's agent and the records, 122 carloads were shipped by McCrea & Vlerebome and 11 by complainant; in 1902, 32 by complainant and 164 by his competitors.

The failure to secure cars when needed for shipment may re-
10 I. C. C. REP.—4.

sult in loss in several directions. If grain cannot be disposed of, capital is tied up and business losses follow. The country wagons are unloaded by dumping the loads into chutes mechanically, with little labor and expense. When the chutes' hoppers and gangways become blocked with grain, wagons can only be unloaded by shoveling, requiring time, labor, and expense, besides making more necessary the movement of grain in the elevator to prevent heating, and greater labor by reason of less room for the necessary movement.

Shelled corn heats in bulk and delay in shipment is a constant threat to the grain in stock, a danger that follows the grain into the belated car and damages the grain in transit, occasioning serious, and sometimes total, loss of the grain shipped. In addition to this is the loss of business sure to follow broken engagements for delivery to customers, consequent on failure to secure vehicles for transportation to make delivery.

Taken altogether, the subject is of vital importance to the grain handler, and he cannot long survive either a car famine or intentional discriminations in the interests of favored competitors.

In July and August, 1902, there was no dearth of cars at New Holland, empty cars standing on the side-track at all times, where the parties might select them as they desired. In the month of July, under these conditions, complainant shipped 4 cars of grain, and his competitors shipped 48, while in August, when there were also plenty of cars on hand, the complainant shipped 4 cars and his competitors 31.

In October, McCrea & Vlrebome were remodeling their elevator, and in September and October shipped but one car each, and complainant shipped three in each of these months. During the great coal strike and resulting car famine of last winter, an embargo was placed, Nov. 17, 1902, upon the shipment of grain to Pittsburg and points east on the Pennsylvania lines, and subject to certain modifications was not entirely removed until March 3, 1903.

It was just in this period, that is from Nov. 10, 1902, to about March 1, 1903, that complainant began keeping a record of cars furnished his competitors. Up to February 1, 1903, McCrea &

Vlerebome received 56 cars, and the complainant 13. Taking the entire month of November, the complainant received 7 cars, and his competitors 13, and in December, with the embargo still in force, the proportions were 7 and 18.

In the distribution of cars to these respective elevators, it is but just that they should be apportioned to the business needs of each, whenever the conditions of transportation are such as to impose a limit. Under normal traffic conditions it is a fair inference that cars will be furnished as demanded, and, indeed, in July and August preceding the filing of the complaint, it was shown that there were at all times empty cars upon the side-track to be had for the asking by either party, and in that period the complainant found need for much less than the proportion accorded him later, though up to the average of his annual sales. The proportionally heavy demand for cars in those months by McCrea & Vlerebome evidently resulted from a desire on their part to empty their elevator in preparation for repairs which they had under consideration.

The mere giving of cars to his competitors and denying complainant equal facilities would be such a discrimination as would result disastrously to his business, unduly develop the business of his rivals and entitle him to relief and reparation.

In 1902 occurred the great anthracite coal strike, and on the resumption of traffic the resulting increased business of the bituminous coal mines to replace the temporary shortage of accustomed fuel for domestic and industrial purposes led to a famine of cars and blocking of the traffic on the roads leading through the coal regions. With exceptions in favor of coal, and sometimes necessities of life and of construction material, an embargo was placed upon general transportation and agents were notified not to receive freight destined for points to or through and beyond the coal districts. Such an embargo was placed by the connections of defendant road, forbidding the forwarding of freight over the Pennsylvania lines for Pittsburg or points east in November, 1902, and, subject to some changes, was not entirely removed until the following March. While restrictions upon transportation of certain articles from time to time have been found expedient, no such general embargo had before been

10 I. C. C. REP.

placed upon the eastern railroads as the one under consideration. The embargo did not of itself work the alleged discrimination set forth in the complaint, that being, it is alleged, the favoritism shown by an agent of defendant in the distribution of such cars as could be secured for the shipment of grain during the so-called car famine. In the period directly complained of, the number of cars furnished the respective elevators seems out of proportion to the business needs and rights of the complainant, and seems also to justify his charge of discrimination, but an analysis of the use to which such cars were put, which complainant did not profess to know, gives color to the declaration of the responsible agent of defendant company, "I have done all in my power to do what was right." From November 10, 1902, to February 1, 1903, the complainant received 13 cars, and his competitors received 56 cars. Of these 56 cars received by McCrea & Vlerebome, 25 were to local points on defendant's line where the embargo did not apply and to which the complainant had no shipments to make. As complainant admitted in his testimony, "I asked for Pennsylvania cars to go east, not to C. & M. V. points." Of the 31 remaining cars shipped out by McCrea & Vlerebome, 7 were foreign cars, and were destined to points not barred at the time by the embargo. To these points complainant had no shipments, and, therefore, could not use the cars. Four of the remaining cars had been offered to complainant at the particular time, and he had no use for them, and they were afterwards given to his competitors.

In the month of January, 1903, the McCrea & Vlerebome elevator shipped 24 cars; of these 21 were local, and complainant testified that he had no corn sold to local points in January, and did not ask for a local car in that month.

It was natural enough that seeing the delivery of so many cars to his competitors at the adjoining elevator, complainant should have felt aggrieved. Having no idea of their destination, as he himself said, and counting the cars in and not out, he could find no explanation but favoritism, no result but discrimination, and these facts, to his mind, made competition impossible. But in the light of the competitive business done by the two elevators, and in view of the embargo for which defend-

ant road was in no way responsible, the difference in the number of cars furnished these respective grain shippers does not seem unreasonable.

Complainant, in December of last year, engaged in the business of selling coal at New Holland. He was required by the defendant to unload the coal at the end of a spur siding about 450 yards from the crossing. The agent of the defendant company, also a dealer in coal, had a yard close to the main line, nearer the center of the town, with a switch, sheds, etc. Permission was refused complainant to unload his coal on the "passing siding" near his elevator, and this he held to be a discrimination, since delivery at the more distant point involved greater expense of handling and subjected him to greater risk of loss from the stealing of coal at the more distant point.

It appears from the testimony that the defendant had refused to permit the competing coal dealer, as well as others who had made application for that privilege, to unload coal upon the "passing siding" because it would be dangerous to traffic. Other freight is unloaded there, but only 24 hours are allowed for that purpose, while 96 hours are allowed for unloading coal cars.

The competing coal dealer for six years handled coal from the point where complainant now receives it, and had increased the trade until the revenue to the railroad amounted to \$2,000 a year. He then purchased a lot, leased a strip from the railroad, erected necessary buildings, and the road, a predecessor of the defendant company, built for him a spur siding, on which his coal was handled. Since that time the defendant had acquired the line upon foreclosure, but continued the arrangement already in existence. Whether all this constitutes such a discrimination as would entitle complainant to the relief sought and reparation demanded, is, in the present inquiry, immaterial, since the half dozen loads of coal which he had handled in the season were bought in New Alexander, Ohio, and sold in New Holland, Ohio, and were, therefore, not interstate traffic, and not under the jurisdiction of this Commission.

The claim of damages by the complainant who, on the hearing, asked leave to amend the complaint from \$400 to \$5,000, was based in part on loss by heating of corn delivered within a 10 I. C. C. REP.

five-year period; the heating, whether in the car in transit or in the elevator, it was charged, was due to, and the direct result of, delay in furnishing cars; though in one specific instance he attributed the loss to a defective car with broken doors, which admitted snow and damp to the grain. It may be assumed that the embargo mentioned which put a stop to grain movements for a time, was sure to result in damage and loss to delayed shipments, and the competing elevator owners testified to a greater estimated loss than that sustained by complainant, though estimates are at best unsatisfactory bases of computation or comparison.

The loss claimed to the selling value of complainant's elevator is based on an alleged injury by reason of such a discrimination in favor of the rival elevator, as to discourage possible investors from giving full value for complainant's plant. If every charge of favoritism and undue preference could be established, and the injury to complainant's elevator made apparent by reason of such discriminations, a change in the ownership of the railroad or of the competing elevator would no doubt restore the full value of his property and might shift the burden of apparent loss to the competing elevator. A change of the agent alleged to be responsible for the discrimination, or a change of policy that would give the complainant every facility he claims, would doubtless bring about a like result.

That there was any such undue preference in favor of McCrea & Vlerebome or unjust discrimination against the complainant as to warrant an order for relief or reparation, does not appear from the testimony or records of the case, and the complaint must, therefore, be dismissed.

IN THE MATTER OF THE PUBLICATION AND FILING OF TARIFFS ON EXPORT AND IMPORT TRAFFIC.

Decided February 5, 1904.

1. The Act to regulate commerce now requires the publication of import and export tariffs in the same manner as domestic tariffs.
2. That public policy urgently requires that the inland transportation of import and export commerce should be subject to the Act to regulate commerce, and that the publishing and maintaining of tariffs upon such traffic imposes in most instances no hardship upon the carrier. There may be cases in which a modification of this rule would be of service to the carrier without detriment to the public, and perhaps other instances in which such a modification should be granted in the interest of both the carrier and the public. This can only be accomplished by an amendment of the Act, since the provisions of that statute are mandatory, and the Commission has no power to modify their requirements.
3. If carriers are to any extent relieved from giving the notice now required of advances and reductions in rates upon foreign commerce, they should in all cases file with the Commission the rates actually made, and give such further notice to the public as may be possible.
4. The carriers will be afforded an opportunity to adjust their tariffs and arrangements, and, if so advised, present the subject to Congress, provided, however, that in the meantime all carriers which do not publish and maintain import and export tariffs shall file with the Commission as promptly as possible a statement of the rates actually charged. If the Act is not amended within a reasonable time, it will be the duty of the Commission to enforce the publication of import and export rates in the manner now provided by law.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, *Commissioner*:

This Commission has from the first assumed, and several
10 I. C. C. REP.

times expressly decided, that the Act to regulate commerce imposes the same duty in respect to the publication of tariffs for the movement of export and import as for domestic traffic. The state of the law was such, however, up to the passage of the so-called Elkins bill, February 19, 1903, that there was apparently no very effective means by which the publication of these tariffs could be compelled. This, together with a feeling that there might be cases in which an insistence upon this requirement would be injurious both to the carrier and the public, has led us to refrain hitherto from any active attempt to secure a compliance with the statute in this respect. By the enactment of the above-named bill a means was furnished for the enforcement of this provision, and it has seemed to us that we ought to insist in the present state of the law upon the publication of these tariffs. In view, however, of what had transpired in the past it also seemed suitable before taking steps in this direction to notify the various parties interested of our intention, and to give opportunity for a statement of the particular difficulties which would attend a compliance with the law as interpreted by the Commission, and to urge any reasons why that construction was wrong. The matter was accordingly set down for public hearing at Washington, December 17, 1903, and was further heard at Chicago on January 7, 1904. At these hearings, especially at the one in Washington, there was a very full representation of the carriers interested from all sections. There were also present representatives of the United States Export Association, of the Foreign Trade Association of America, and of various shippers and manufacturers from different parts of the country. Many statements were made as to the situation from a practical standpoint and several arguments advanced and briefs filed upon the legal aspects. Before stating our conclusions in the matter it seems necessary to give a brief account of the manner in which export and import rates are now made and the extent to which they are now published. This statement is compiled from information furnished upon the two hearings referred to, and also from the general knowledge we have derived from many previous investigations in which this subject has been either directly or incidentally involved.

In establishing export and import rates, three general methods appear to be followed; first, by adding a fixed inland proportion to each port to the fluctuating ocean rate from that port; second, by ascertaining the lowest combination as above through any particular port from a point in the United States to a foreign destination, and making that same rate through all ports; third, by quoting to each applicant for a rate whatever rate appears to the traffic manager advisable at the time of the application.

The inland rail carrier to the Atlantic and Gulf ports is seldom interested financially in the means of transportation beyond the port of export or import, the ocean lines being owned and controlled by independent agencies. There are cases in which certain railways form traffic arrangements with particular ocean lines; in some instances there seems to be a community of control, but the rule is as first stated; the rail carrier is only interested in the movement of export and import traffic to and from the port of trans-shipment. The practice upon the Pacific coast is understood to be otherwise, but of this we have no exact information.

Most import and export traffic to or from inland points, with the exception of grain, is handled upon through bills of lading. Upon export business the initial rail carrier quotes a through rate and furnishes a through bill, but in such case the service of the rail carrier is usually confined to ascertaining the ocean rate, combining that with the proper rail rate and naming the through rate for the convenience of the shipper. The bill of lading when issued consists in effect of two bills, one from the railway to the port of export, the other from the steamship from the port of export to the foreign destination, the terms and conditions of the two being entirely distinct.

Ocean rates from all the ports vary. It does not seem necessary to consider here the extent of this variation further than to say that the rate differs from day to day and sometimes from hour to hour. The same kind of merchandise carried in the same vessel even for the same person may pay different charges for transportation.

Most rail carriers engaged in the transportation of import
10 I. C. C. REP.

and export traffic through Atlantic and Gulf ports publish and file with the Commission what are known as import and export rates. These are usually less than the corresponding domestic rates but not invariably. For example, at the present time the export rate on grain from Chicago to New York is 15 cents, the domestic rate 20 cents; the export rate on wheat from Kansas City to Galveston is 17 cents as against a domestic rate of 33½ cents. On the other hand, cotton generally takes an export rate from 1½ to 3 cents per hundred pounds higher than the corresponding domestic rate. These import and export rates to the various ports are designated as such in the schedules filed with the Commission, but in other respects are published in the same manner as domestic tariffs, the same rule as to time being observed in giving notice of advance and reduction.

Now the first method of making the through rate consists merely of adding together the inland rail rate fixed as above and the ocean rate. The through rate on any commodity from Chicago to Liverpool *via* New York would be determined to-day by taking the sum of the published rate from Chicago to New York and whatever ocean rate could be obtained from New York to Liverpool; if a lower combination were possible through the port of Boston or Philadelphia the traffic might move through those ports, but the rail rate to the port of New York would not for that reason be reduced.

By far the greater part of the export and import traffic of this country is at the present day moving under this method. This is true of all grain passing out through the Atlantic and Gulf ports with possibly some insignificant exceptions at some of the minor southern ports. Even to Galveston and New Orleans, as well as to the North Atlantic ports, a fixed export rate is observed, and this rate is not advanced except upon ten days' notice, nor reduced except upon three days' notice. The same is true of most import and export traffic of all kinds moving in and out through the ports of Boston, New York, Philadelphia, and Baltimore. Not only are tariffs made and published in this way through these ports, but representatives of the principal lines carrying that traffic expressed it as their conviction that this could and ought to be done, both in the interest of the public

and the carriers. The distinctive feature in this method is that while the ocean rate and therefore the through rate may fluctuate the rail proportion is only varied upon the same notice as is required when the domestic rate is changed.

The second method is simple in theory but somewhat complicated in operation. It may be best understood by taking a concrete example. Aberdeen, Mississippi, is located upon both the Illinois Central and the Mobile & Ohio railroads, of which the Illinois Central operates exclusively through the port of New Orleans and the Mobile & Ohio through the port of Mobile. Let us suppose that a cotton shipper on the first day of January, 1904, applies to the agent of the Mobile & Ohio for a through rate on cotton to Liverpool, England. The published export rate of the Illinois Central to New Orleans on that date was 48 cents per hundred pounds. Let it be assumed that the ocean rate quoted in New Orleans upon that same date was 30 cents per hundred pounds, which would be approximately the fact. The sum of these two rates establishes the through rate from Aberdeen to Liverpool at 78 cents per hundred through the port of New Orleans. The export rate by the Mobile & Ohio from Aberdeen to Mobile was 43 cents on January 1, but the ocean rate from Mobile to Liverpool on that day was perhaps 40 cents per hundred, 83 cents in all. But the through rate *via* that port cannot be greater than *via* the port of New Orleans; hence if the Mobile & Ohio is to compete for this traffic it must quote a rate not higher than 78 cents. It does quote just that rate, and if the traffic is given to it for transportation it "protects" that through rate; that is to say, it pays the steamship company 40 cents for the ocean carriage and retains for its own services 38 cents, thereby accepting 5 cents per hundred pounds less than its published rate.

What is true of cotton at Aberdeen is true at all other competitive points in the South. The lowest combination upon which the foreign destination can be reached from a given point is applied through any port, the inland carrier receiving for its compensation whatever may remain after the ocean carrier has been paid its charge.

10 I. C. C. REP.

With respect to the application of this method it should be noted:

Several lines operating south of the Ohio and Potomac rivers and east of the Mississippi, that being the territory in which this method is in universal operation at the present time, do not file export and import tariffs. While it is understood that such lines adopt the same principle of rate-making, neither the Commission nor the public has any information as to the inland rate upon which the combination is formed.

The Southern Railway files with the Commission a statement showing in each case the through rate quoted by that company, giving the point of origin, the point of final destination, the ocean rate, the inland division, the date of the quotation and the length of time during which it will continue in force, being usually twenty-four hours. The Illinois Central files from time to time, in addition to its export rates to the port of trans-shipment, a tariff of through rates from various points of origin to various foreign destinations. These schedules show the date when the rate takes effect and the date of expiration, which is usually more than twenty-four hours, ordinarily some days.

Neither the tariffs of the Illinois Central nor of the Southern are received by the Commission usually until after the expiration of the life of the quotation. It does not appear from any testimony before us whether these tariffs are posted at the station from which the quotation is made or what notice the public has of the rate in question, except as hereinafter stated. These rates appear to be given as a rule only upon application and with a view to some particular shipment. Some years ago several lines united in employing a joint agent located at Memphis, Tennessee, whose duty it was to ascertain the lowest combination and promulgate each day for the following twenty-four hours a schedule of rates applicable from Memphis and points governed by Memphis by all lines and through all ports. This publication was open to the inspection of the public and was binding upon those lines which the agent represented, and whose names appeared upon the tariffs; such daily bulletins were for a long time filed with the Commission, but that practice has for the last year been discontinued. Each carrier, except as above indicated,

10 I. C. C. REP.

ascertains in its own way what the ocean rate may be from each of the different ports. It would appear probable therefore that the quotation for a particular day need not be necessarily the same by all lines, but of this there was no evidence before us.

What has been said of this second method has had reference to cotton which is the principal article of export produced in Southern territory; but it is understood that the same method of rate-making is applied to other exports, except grain, through the Southern and Gulf ports. We are not clearly informed as to the methods used in this territory in the making of import rates. It seems probable that very little import traffic is handled to inland destinations upon through bills *via* Southern ports, except through New Orleans. The representative of the Illinois Central stated at the hearing in Washington that, beginning January 1, 1904, his line proposed handling import traffic upon published schedules, although differing in amount from the corresponding domestic rates.

The third method is easy of comprehension and application. Under it the carrier names upon request whatever export or import rate it sees fit. It may quote different rates to different persons at the same time; or it may vary its rates from hour to hour and day to day. The rate quoted has no reference to any published domestic or export schedule; the carrier simply names whatever figure will, in its judgment, best subserve its interests.

To these should perhaps be added a fourth method, of which rates from various southern points to Havanna, Cuba, are in illustration. Here the carrier establishes a joint through rate from the inland point to the foreign destination. The tariff contains no statement of either the inland or water division, nor does it appear how the total rate is determined; the rail carrier files and publishes a joint through rate exactly as joint domestic rates are published. There are but few instances of such tariffs *via* Atlantic and Gulf ports and these have only been filed recently. It is understood that the rates are adhered to. Such tariffs are also filed with the Commission by various transcontinental roads in connection with certain steamship lines plying between Pacific Coast ports and the Orient, under which rates are named between various points in the East and inland points

10 I. C. C. REP.

in the United States. While such tariffs are filed and are only changed upon the notice required by the 6th section, it is doubtful if they are in all cases adhered to in the actual movement of the traffic which they cover.

The extent to which these different methods are applied cannot be stated with absolute accuracy, but can be indicated with considerable confidence in a general way. Sworn testimony taken by the Commission about a year ago shows that import traffic through the ports of Boston, New York, Philadelphia and Newport News, is for the most part handled by the first method; that is, inland carriers publish and maintain the rates at which such freight is carried from the port of entry to the inland destination. The representative of the Illinois Central Railroad Company, as above noted, stated that, beginning January 1, 1904, his company would handle its import business through the port of New Orleans by this method. The great bulk of importations through the Atlantic and Gulf ports comes in through the ports above named.

Grain of all kinds is uniformly exported by the first method. All exports from territory east of the Mississippi river and north of the Ohio and Potomac rivers seem to be handled by the same method. Cotton is exported through all the ports by the second method, and probably some other articles produced in southern territory, particularly lumber, are handled in the same way. Traffic from points west of the Mississippi river which may pass out through either the Gulf or Atlantic ports, particularly grain products and packing-house products, seems to be handled through all the ports to some extent by the third method. Our impression is, although we have no definite information as to this section, that the third method is applied to the handling of considerable traffic both in-bound and out-bound through Pacific coast ports.

It will be seen from the above statement that a very large percentage, probably at least 75 per cent of this foreign business, is now transported upon published rates and that the balance is handled in whatever way seems most convenient. The whole subject is, however, in great confusion, no definite rule being observed in any territory. This arises largely from

the uncertainty of the carriers as to what the law is and in how far it must be observed. It seems proper, therefore, to state what interpretation the Commission puts upon the act in this particular, and to notice briefly some of the claims which have been urged upon our attention in connection with the present inquiry.

The Commission has repeatedly held that export and import rates should be published. *New York Produce Exchange v. New York C. & H. R. R. Co.* 3 I. C. C. Rep. 137, 2 Inters. Com. Rep. 553; *New Orleans Cotton Exchange v. Louisville, N. O. & T. R. Co.* 4 I. C. C. Rep. 694, 3 Inters. Com. Rep. 523. Previous to the decision of the *Import Rate Case* by the Supreme Court of the United States, hereinafter referred to, the Commission required the publication of the inland proportion received by the rail carrier; since then it has held that where a through rate was named and a through bill of lading issued the inland carrier might publish either the total through rate or its inland division, at its option. *Re Export and Domestic Rates*, 8 I. C. C. Rep. 214.

We are now met with the claim that when traffic is transported from a point within the United States to a point in a foreign country not adjacent, upon a through bill of lading, such transportation is not within the purview of the Act to regulate commerce. This view is urged in behalf of the transcontinental lines, the argument being, as we understand it, as follows: The first section of the Act defines the traffic which is subject to its provisions. This definition includes all interstate transportation by rail; it does not include by any comprehensive language all transportation between points in the United States and points in foreign countries, but states in detail what traffic of the sort is embraced, using the following language:

“Or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of

10 I. C. C. REP.

trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country."

Now it is urged that Congress, had the intention been to include all foreign commerce, would have so stated in comprehensive terms; that no distinction would have been made between adjacent foreign countries and those not adjacent, nor would the words "carried from such place to a port of trans-shipment" have been used; that the addition of these words, therefore, plainly shows that the act was only to apply to traffic carried upon an inland bill of lading to the port of trans-shipment; that when the transportation is upon through bill from a point in the United States to a point in a foreign country, it is not within the terms of the first section, and, therefore, not subject to the 6th section or any of the remaining provisions of the act.

It has already been seen that export and import traffic is in fact sometimes handled upon an inland bill of lading to or from the port of export or import, and sometimes upon through bill of lading between the point in the United States and that in the foreign country. There is no particular reason why substantially all traffic might not be conducted at the option of the carriers upon through bills. In other words, the carriers might at their election, by the manner in which the business is transacted, remove all foreign commerce from the operation of the Act to regulate commerce. One rate may be made one shipper and a different rate some other shipper. Rebates may be granted and discriminations practiced without hindrance. When the volume of our foreign traffic is considered, together with the extent to which that traffic is handled by rail, this proposition becomes somewhat startling, and the conclusion ought not to be accepted unless reasonably clear.

We are not aware that this construction of the language of the first section has ever been urged upon the Commission before. It is certainly ingenious, and as stated is not without force. We are, however, unable to assent to it. While it may be impossible to say of this as of many other parts of the Inter-

state Commerce Act just why certain language was used, or exactly what was intended by the words employed, a reading of the first section does not give the impression that the framers of the act intended to exclude from its operation all the vast volume of commerce with foreign countries not adjacent; upon the contrary, the impression is that the intention was to include all such commerce and that the very detail of the phraseology in question indicates this.

The words used in their natural meaning clearly include such commerce; if the intent had been to exclude so important an item this would have been done in terms, and not left to a forced construction. No extended discussion of the question seems profitable, however, since the Supreme Court of the United States has already apparently passed upon this question. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The Commission had decided that the jurisdiction of the Commission was limited by the port of import, that it was immaterial whether traffic came to that port from some point in a foreign country, and that the rates charged by inland carriers for transporting import traffic must be the same as those applied for the handling of corresponding domestic traffic. The Texas & Pacific Railway Company engaged in the transportation of commodities from Liverpool, England, to San Francisco, California, upon a through bill of lading, and accepted as its compensation a much less sum than it charged for the transportation of the same articles under the same circumstances when they originated at New Orleans, from which practice the Commission ordered it to desist. This carrier disregarded the order of the Commission upon the ground that the traffic originating at Liverpool might reach San Francisco by various routes, and that such competition compelled it to make the lower rate. The real question was whether the Commission should have considered the entire through rate from Liverpool, or only the inland haul from New Orleans to San Francisco. The Supreme Court held that the entire through rate and the circumstances under which it was named both at home and abroad should have been considered. In the opinion it examined the scope of the first section 10 I. C. C. REP.—5.

with a view to ascertaining whether that section embraced transportation of the kind involved, and reached the conclusion that it did. After quoting the language now before us, the court said:

“It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a state) as well that between the states and territories as that going to or coming from foreign countries.”

The construction which the carriers now seek to put upon these same words of the statute excludes from the purview of the act all foreign commerce except that to or from adjacent foreign countries.

In the course of its opinion the court also made reference to the publication of schedules applicable to such traffic. It was urged upon the court in support of the view of the Commission that the 6th section required a publication of the rates under which traffic embraced within the act was transported, and that a publication of these rates in foreign countries could not be enforced. In answer to this it was said:

“The force of this contention is not perceived. Room is left for the application of these provisions to traffic originating within the limits of the United States, even if, for any reason, they are not practically applicable to traffic originating elsewhere. Nor does it appear that the Commission may not compel all common carriers within the reach of their jurisdiction to publish such rates, and to furnish the Commission with all statements or reports prescribed by the statute.”

While the exact question presented was not before the court, the entire reasoning of the opinion is against the present contention. We think this case in effect holds that traffic transported from a point within the United States to a point in a foreign country through a port of trans-shipment upon a through bill of lading is within the first section.

Assuming, however, that this traffic is within the purview of

the first section, it is insisted that the 6th section does not require the publication of schedules specifying the rates under which it moves. Upon that proposition it may be well to quote the exact language of the section so far as pertinent. The first paragraph provides:

"That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route."

Later in the section it is provided that the rates so posted shall be observed by the carrier, and that no advance in them shall be made except upon ten days' and no reduction except upon three days' notice. Still later in the section the following language occurs.

"Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed prac-

ticable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem practicable for such common carriers to publish, and the places in which they shall be published."

It is then further provided that no advance shall be made in such joint tariffs except upon a notice of ten days, and no reduction except upon a notice of three days.

Unless the language employed in one or the other of the above excerpts requires the publication of these tariffs, nothing in the 6th section does. It is urged by certain carriers that these import and export rates are clearly not within the first provision, since the carrier does not own or control the line from the inland destination to the foreign port, and that they are not within the second provision since the term "joint rate," as there used, applies to a joint rate established between two carriers subject to the act and not to a joint rate where one of those carriers acts under a foreign jurisdiction. The Commission is of the opinion that, if a joint rate is in fact made under which the traffic moves, it is entirely immaterial whether the carriers between which the arrangement is formed are all operating within the United States and therefore subject to this act; that while as a practical matter it may be impossible to require the filing and publication of such joint tariffs by those carriers not subject to the statute, there is no reason why the carrier which does operate in the United States and which is subject to the act may not be compelled to post and file the tariffs under which it transports this traffic.

The first section plainly provides that any carrier engaged in the transportation of traffic by rail between a point in the United States and a point in a foreign country is subject to the act. The Grand Trunk Railway extends from Chicago, Illinois, to Toronto, Canada, and transports traffic over its own line the entire distance. No question would probably be made that this company is required by the 6th section to post and file the tariffs of rates and charges under which this traffic is carried. The Wabash Railway carries traffic from Chicago to Detroit, from which point it is transported by the Canadian

Pacific Railway to Toronto. These two lines establish by arrangement between themselves a joint rate under which this traffic passes from Chicago to Toronto. Is there the slightest doubt that under the provisions of the 6th section this joint rate must be published exactly as the rate established by the Grand Trunk Railway is published? The mere circumstance that the Canadian Pacific Railway operates wholly within Canada cannot excuse the Wabash Railroad from the publication of the joint tariff which it has put in effect.

The first section also declares that the provisions of this act shall apply to rates made by rail and water when both are used under a common control, management or arrangement for a continuous carriage or shipment. If a rail line leading from New York to Buffalo in connection with a water line carrying from Buffalo to Sault Ste Marie, Michigan, establishes a joint rate for the continuous movement of freight between those points, it is clear that such joint rate must be published. Suppose, now, that this schedule for the through movement applies from New York not to Sault Ste. Marie, Michigan, but to Sault Ste. Marie, Canada, is there any reason why the joint rate made to the latter point should not be published, as well as the joint rate made to the former point, by the railroad leading from New York to Buffalo, even though the steamship line from Buffalo to Sault Ste. Marie is not subject to the jurisdiction of this country? So also with traffic from Buffalo to Liverpool through the port of New York. That traffic is by the express language of the first section made subject to the provisions of this act. If, in fact, a joint rate is made upon which the traffic moves, that joint rate must, under the 6th section, be published by the inland carrier which enters into the joint arrangement and participates in the movement. Nor is it excused from publishing such joint rate because, as a practical matter, the water carrier cannot be compelled to publish or observe the same rate.

The real question seems to be whether the through rate to a foreign destination is in fact a joint rate, and upon this the position of the Commission does not seem to be clearly apprehended. To show what that is by concrete example, the statement filed at the hearing in Washington by the Chesapeake & Ohio 10 I. C. C. REP.

may be referred to. This company alleges that it engages in no import business; that it exports but three commodities, *viz.*, cotton, cotton seed and its products, and pig iron. It publishes inland rates at which it transports these commodities from the point of origin to the port of export. If a shipper applies for a through rate, it goes into the market, obtains the best ocean quotation possible, adds that to its published inland rate, and names the result as a through rate. It further states that it uniformly observes its published inland proportion, except that occasionally in the transportation of cotton it shrinks this rate to meet competition through different ports. Its impression seems to be that the Commission requires a publication of the through rate thus arrived at to the foreign destination. Such is by no means the case. The Commission has never expressed an opinion that a rate of this kind is a joint rate. We have not examined the through bills of lading issued by the Chesapeake & Ohio, but we have consulted those issued by other companies. While such bills name a through rate, they really consist of two independent contracts, one for the rail transportation to the port of export, containing a set of conditions adapted to that part of the service, and a second for the carriage from the port of export to the foreign port containing another set of conditions. The bill is signed by the agent of the railway company acting, as stated in the body of the instrument, severally, and not jointly, for his company and the exporting steamship company. The mere fact that the carrier, for the convenience of its patron, ascertains and quotes a through rate made up in this way, that it authorizes its agent to act in the issuing of such bill of lading as the agent of the steamship company, does not of necessity make this a joint rate. It seems plain to us that the rate of the inland carrier in such case must be either a joint rate to the foreign destination or a local rate to the port of export. In either event the law requires the carrier to publish the rate. We permit the carrier to determine whether its rate is in effect joint or inland, and to publish and maintain either as it may elect.

Certain railways employing the second method, that being the one by which rates are equalized through the different ports,

while not conceding that the publication of import and export rates is required, do insist that what is now done by them amounts to such a publication in fact, if the law requires one. Of these the Southern Railway may be taken as an example, and what it actually does in the transportation of export cotton considered.

That carrier publishes a tariff naming "export rates" from interior points reached by its system to various ports of export. These export rates are the same as the domestic rates except that there is added the cost of delivery at the shipside, which in case of most ports is 1½ cents per hundred pounds. These rates are only advanced and reduced upon ten days' and three days' notice. In connection with this tariff appears the following rule:

"Export rates of this company and its connections will be based upon full inland rates to the Gulf or Atlantic ports (including the terminal charge) plus the prevailing ocean rates from the ports. (Ocean quotations for less than 1,000 bales will not be used in making such combinations.) The lowest combination rates will be applied by this line and its connections."

Under the operation of these tariffs and this rule, the Southern Railway determines the through rate from any station upon its line to a foreign destination in this manner: It ascertains the ocean rate from all ports accessible by its own line or others from the point in question, adds to this ocean rate the published inland rate to each port, and takes as the through rate the lowest sum resulting. In actually moving the cotton, however, it may be carried, not through the port by which the rate "makes," but through whatever port the Southern Railway elects. The railway issues a through bill of lading, pays the ocean carrier its rate, and retains the balance for its service. The Southern Railway claims that this is a compliance with the 6th section.

The first paragraph of that section requires common carriers subject to the provisions of the act to print and keep open for public inspection their tariffs. The second sentence of the paragraph reads as follows:

"The schedules printed as aforesaid by any such common
10 I. C. C. REP.

carrier shall plainly state the places upon its railroad between which property and passengers will be carried and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges."

The attorney of the Southern Railway contends that this language plainly implies that a carrier may put in force a rule or regulation which will change from time to time the actual cost of the transportation and that the rule in its tariff above quoted is such a rule or regulation. In other words, that by publishing its inland rates, which are seldom if ever used, and a statement of the manner in which the through rate shall be made, it in effect publishes, within the meaning of the 6th section, that through rate when made. We express no opinion, much less decide, that the rate to the foreign destination so arrived at is a "joint" rate; but, assuming for a moment that it is, can what is done by the Southern Railway amount to a legal publication of that rate?

The act requires that tariffs shall be plainly printed in large type and that copies for the use of the public shall be posted in two public and conspicuous places wherever freight is received for transportation; the manifest intent being to afford the public a means by which a person desiring to make shipment from a particular station, by a particular line, can obtain the rate applicable to such shipment. Joint rates are to be given whatever measure of publicity the Commission may direct, and it has directed that they shall be printed in the same manner as are the rates of individual lines. Take Memphis as a point of shipment. The prospective shipper desires to ascertain what the rate is by which he can make shipment of cotton from Memphis to Liverpool *via* the Illinois Central Railroad. What must he do? Memphis is connected by various lines of railway with probably every port of export from Boston to Galveston. He must, therefore, in the first place, travel around to every railroad station in the city where cotton is received for shipment to

the seaboard and ascertain the rail rate from Memphis to the port. He must then learn what the ocean rate is from every port upon the Atlantic or Gulf at that particular moment to Liverpool. This he probably cannot do at all; certainly not without expending some time and considerable money. If he can obtain that information, and not otherwise, he may then by a proper application of the rule promulgated by the Southern Railway in its tariff ascertain the rate for which he is in search. Plainly, nothing of this sort can amount to a publication required by the 6th section. There is nothing upon the schedule, taken in connection with any information which the shipper has or reasonably ought to have, from which the rate can be determined. Let it be noted once more that we are not holding that the statute requires the publication of such a through rate.

It is said that there is a joint agent at Memphis who ascertains the rates from the various ports to foreign destinations each day, who makes the necessary computations and publishes in the cotton exchange the rates to foreign destinations which thereupon apply *via* all the ports. The Southern Railway insists that it quotes to an applicant the through rate each day, good for twenty-four hours, and that it quotes the same rate to all applicants. All this may be true; if so, it is all commendable. But none of it is done under mandate of the law. The joint agency at Memphis, if it in fact exists, may be discontinued at any time. That agency, as appears in the foregoing statement of fact, formerly filed these tariffs with the Commission, but has not done so for the past year. The statute requires the publication of these tariffs as a matter of law in a certain manner; it is not a compliance with that requirement to do something else in a different manner.

There might be serious objections in practice to this method of making export tariffs. The through rate by all the ports is made to depend upon the ocean rate. But this ocean rate is not a fixed quantity. It is not like the inland proportion. Its publication is required by no law. The ship has for sale so much space, and that space may be quoted to one person at one price and to another at a different price. The quotation varies from hour to hour as well as from day to day. Two persons attempt-

ing to ascertain, in good faith, this rate from the different ports would often arrive at different conclusions. The law requires that the rate when made shall be adhered to, that it shall be open to all persons alike. How easy under this system of rate-making to justify in case of a criminal prosecution whatever rate has been made, whatever concession has been granted!

Again, whatever rate a carrier publishes is open to the public so long as it is in effect. The rates formed in this manner may or may not be offered the public at the option of the railway company, except as to that particular port through which the rate is made. If the rate on cotton from Memphis is made by the Illinois Central through the port of New Orleans, lines leading from Memphis to other ports may take or refuse traffic at that rate at their option.

It is urged that the language above quoted from the 6th section has no significance whatever unless it be given the interpretation claimed for it. Such is not our understanding. There are many rules and regulations which may affect the rate in a way entirely different from this. The privilege of milling in transit and the conditions upon which it is granted, the right to hold grain in transit for orders, stopping off live stock to test the market or even to feed for an entire season, are illustrations. Whatever variation in the rate is worked by a particular rule or regulation must appear in the regulation itself and not require the examination of extrinsic matter.

The Southern Railway also insists in this respect that if the words of the act do not now permit the making of export rates in this manner, then such words should be construed into the statute as will; upon the ground that unless that method can be followed serious injury must result to our foreign commerce. Cotton constitutes an important part of our exports, being for the year 1902 21 per cent in value of the whole. No construction of this act should be permitted which would interfere with the free movement of that traffic if it can be avoided. We are not at all satisfied, however, as a matter of fact that cotton exports could not be as well handled under the first method as by the second. We are inclined to think that had cotton been ex-

ported from the first upon a published inland rate in exactly the same way that grain is exported, rates would have been lower and facilities better than they are today; certainly that both rates and facilities would be as good as they now are. Cotton at Aberdeen does not reach Liverpool at a less rate because the Mobile & Ohio is allowed to move it through the port of Mobile at the same rate which obtains through the port of New Orleans, although something may be gained in the way of facilities by the affording of two routes. It is certainly possible that if carriers were obliged to publish these rates to the ports in all cases the result would be keener competition. The Mobile & Ohio has no inducement to reduce its rate for export so long as it is allowed to adopt whatever rate is made by other lines without publication upon its part. It is worthy of note that with substantial uniformity the export rates on cotton are higher than domestic rates, while the export rates on grain, which is universally handled upon a published inland proportion, are without exception lower than the corresponding domestic rates.

So too of the ocean rate. At the present time a reduction of the rate from New Orleans to Liverpool does not mean that the steamer at New Orleans will receive the cotton for the reason that railroads not reaching New Orleans, by shrinking their own rates from inland points, are able to pay a higher ocean rate from other ports. If the inland rates were fixed so that the ship at New Orleans bid against those at other points, much keener ocean competition must result.

This practice of equalizing the rate through different ports has without doubt contributed to harmony among the carriers themselves by affording a means of distributing the traffic between various routes, but it is by no means clear that any exigency is presented which calls for a forced construction of this statute in order to permit a continuance of that method. It would in our opinion be much less prejudicial to the public interest to prohibit southern carriers from handling export cotton in this way than to permit the making of all export and import tariffs by that method.

There seems to be an impression that this inquiry was instituted with a view to making some general order with reference
10 I. C. C. REP.

to the publication of import and export tariffs. This is entirely erroneous. The Commission has no discretionary power whatever in the premises. The Elkins act provides that failure upon the part of a carrier to file and publish the tariffs or rates and charges as required by the Interstate Commerce Act, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor punishable by heavy fine. If the act to regulate commerce requires the filing and maintenance of these rates the statute of February 19, 1903, is mandatory in requiring a compliance with that provision. The purpose of this inquiry was, first, to hear what might be said as to the interpretation of the act in that respect; second, to ascertain what practical difficulties might stand in the way of a publication of these rates; for if the Congress had unwittingly imposed an unreasonable burden upon the foreign commerce of this country we felt that opportunity should be afforded for a correction of that mistake. We have concluded, as already indicated, that the act requires such tariffs to be filed and maintained, and it now remains to state our view of the practical effect of that requirement.

The Commission would regard it as a grave misfortune if export and import traffic were withdrawn from the supervision of the law. Since the enactment of the Act to regulate commerce the trade of this country, especially the export trade in manufactured articles, has enormously increased. There is hardly a mill or factory at the present time, of any pretension, which does not seek to a greater or less extent a foreign market; and the ability to reach that market often determines the success of the enterprise as a whole. When the foreign market is used as a dumping ground for surplus production, which can not be consumed at home, the price is usually closer than the domestic price, the cost of transportation is of first importance in determining the accessibility of the market, and the inland rail transportation in this country a factor of great importance. If the American rail line is allowed to make whatever rate it sees fit upon export business, to pay whatever rebate and grant whatever concession it pleases, to extend facilities to one shipper which it denies to another, the power exists to discriminate against a competitor to the extent of finally driving him from business.

10 I. C. C. REP.

The foreign rate may be the direct equivalent of concessions on domestic tariffs. And if the power exists the history of the past conclusively shows that it will be to a greater or less extent used and abused. There is scarcely a reason for placing domestic rates under legal control which does not apply with equal force to export and import business. To remove it from such control would result in chaos.

Nor does there appear to be in most instances any good reason why these rates cannot be published and maintained; of which the best possible evidence is the fact that this is now done. In the year 1902, 80.19 per cent in value of our total imports came in through the Atlantic ports, and we have already seen that this traffic is handled under the first method, that is, by publication and maintenance of the inland rail rate. The same year 3.44 per cent came through the Gulf ports, 1.52 per cent over the Mexican border, 7.50 per cent over the Northern border and by lake, 1.34 per cent directly to interior points, and most of this traffic was also carried upon tariffs established under the first method; 6.01 per cent came in through Pacific ports and this possibly moved largely by the third method. So of our exports, of which during the same year 93.67 per cent passed out through the Atlantic and Gulf ports and the Southern and Northern borders moving for the most part, with the exception of cotton, upon a published inland tariff. Of the total, 6.33 per cent was exported through the Pacific Coast ports and our information as to this is not definite. Through schedules are filed both on export and import traffic through these ports, but are not perhaps maintained. It is evident that the bulk of all import and export business is to-day handled upon a tariff published and maintained exactly as domestic tariffs are, nor is it seriously contended that it would be for the interest of railway or public if the practice were otherwise.

Southern lines insist, however, that the same method of making and publishing these rates cannot be followed in the South as is observed through the North Atlantic ports, especially in the movement of cotton. It has been already suggested that this is of more importance to the railroads than to shippers. The claim is not that the rate to the foreign destination must be an elastic

10 I. C. C. REP.

one in order that the American seller may meet the price of his foreign competitor, but merely that it shall be the same *via* all the ports so that each of the competing rail lines may obtain a fair share of the traffic. In point of fact the rate as formed by this second method is not more elastic than when formed by the first method, the only elasticity in either case being in the ocean proportion. This scheme of equalization through all the ports seems to be an arrangement by the railways for the purpose of restricting competition and distributing traffic between various lines. Still it has all along appeared to us, and still does, that conditions at these Southern ports although improving are different from those at the North Atlantic ports, and that to enforce the same rule as to the publication and maintenance of export and import tariffs might bear more severely upon them than it would upon Northern lines. There are moreover without doubt factors which enter into the situation which the Commission does not fully appreciate. Conditions attending the movement of cotton are peculiar to that traffic. So far as we know the present method has given satisfaction to shippers and has not resulted in confusion or discrimination. While no such method could be applied to the miscellaneous export and import traffic of this country, so far as we are informed there seems to be no good reason why it might not be continued in the movement of cotton. The carriers handling this traffic insist that it is a matter of first importance to them that it should be. If the Commission had the power to modify the requirements of the act as to the publication of tariffs upon certain specified commodities it probably would unless some different state of facts was made to appear, permit the movement of export cotton in the manner now and of late years in vogue, subject of course to reasonable requirement that whatever rate was named should be filed with the Commission and afforded all shippers alike. The same might be true of some other commodities in Southern territory. Whether as applied to the movement of the same traffic there might be with propriety one rule as to publication through one port and a different rule for another port is a question of more difficulty. If so it would be in the nature of a differential accorded the weaker line.

The case presented by the transcontinental lines is entirely different. The claim here is that the rate must be an elastic one and that to compel the publication of a rate which can only be advanced upon ten days' notice and reduced upon three days' notice would be destructive of the interests of both shipper and carrier.

The information of the Commission as to conditions upon the Pacific Coast is extremely meager and not sufficient to justify the expression of an opinion. It is apparent, however, that there may be great force in the claims of these carriers. The market for American products in the Orient is not yet established but is still in the formative state. The American producer meets there competition from England, France, Germany and other European countries. Freight rates from those countries are by water, need not be published, and are subject, so far as we know, to no governmental supervision. It is asserted that if the rate under which the American manufacturer must operate is a fixed quantity, which can only be varied under certain conditions, he is at a disadvantage in comparison with his European competitor; that the search for these markets is a joint venture between the manufacturer and the carrier, and that each must be ready to meet by advance or reduction the competition which is found. The carrier should not be prohibited from giving aid to the American producer.

There is this further consideration. Lines of ocean communication between Pacific ports and the East have not yet reached that stage of development to which they have advanced upon the Atlantic. While as already said very few railway systems are directly interested in lines of transportation leading from the Eastern seaboard, exactly the reverse is true upon the Pacific coast. Nearly all transcontinental lines either directly maintain or are interested in lines of steamships plying between a Pacific port and the Orient. It is alleged that in no other way can the necessary vessels for ocean carriage be obtained at the low rate which must be made. It is apparent that a line of railway cannot successfully maintain a steamship line across the Pacific unless it has power to prefer its own line to other ships. But if it is compelled to publish an inland differential it must accord that

10 I. C. REP.

rate to anyone who offers merchandise for transportation. It must carry to and from the port for the same price when the freight comes or goes by some tramp steamship as when it is carried in its own vessels. It may to be sure publish a through joint rate and may use its own steamers exclusively in carrying under this rate, but in that event it must publish the joint rate and rest therefore under the disadvantage of not being able to vary it as occasion requires.

Upon the other hand it is evident that the practice contended for by these transcontinental carriers might ultimately result in a condition highly prejudicial to the public interest. If the railway line has power to prefer its own steamship to other ocean transportation, to carry to the seaboard for a much lower charge in one case than in the other, this must result in discouraging the development of independent lines to the Pacific Coast. The ocean carrying trade to and from those ports must unavoidably become concentrated in those lines having satisfactory rail connections. If now these several lines agree among themselves upon rates from inland points to foreign destinations in exactly the same way that the transcontinental lines themselves have to-day agreed as to rates between inland points, there would result a condition of monopoly producing much higher through rates than as though the inland carriers were compelled to afford the inland service upon the same terms however the traffic might move by water.

Without, however, attempting to discuss the questions of policy which might be presented, for the proper consideration of which the Commission does not now possess the necessary information, it is evident that there may be here a condition where the rigid enforcement of the present requirements of the act as to the publication and maintenance of foreign schedules would work a substantial hardship to both the carrier and the shipper.

One other observation is pertinent to this whole subject. While the Supreme Court of the United States has held carriers are not prohibited by the act from establishing lower rates upon export and import traffic than are applied to corresponding domestic traffic, and while it often happens that this may be done

with propriety, and indeed must be done, the practice is not without limit. Carriers should observe some due relation between charges which they impose upon domestic and foreign commerce. In this view it is important that the exact rates which are charged should be made public. A complaint received since the beginning of the present inquiry illustrates this. The complainant desired to ship the machinery for a stamp mill from Chicago to China. Being interested in a line of steamships between San Francisco and the East, his intention was to make shipment to San Francisco and thus to destination by his own line. Upon investigation, however, he learned that the rate from Chicago to San Francisco was \$1.25 per hundred pounds, while from Chicago to Shanghai it was 90 cents per hundred pounds. The rate at that time from Shanghai to San Francisco was 20 cents per hundred pounds. Had he desired to lay down his stamp mill at San Francisco, he could have shipped it to Shanghai, and from Shanghai back for 15 cents per hundred pounds less than the direct rate from Chicago to San Francisco.

Our conclusion upon the whole subject is:

1. That the Act now requires the publication of import and export tariffs in the same manner as domestic tariffs.

2. That public policy urgently requires that the inland transportation of import and export commerce should be subject to the Act to regulate commerce, and that the publishing and maintaining of tariffs upon such traffic imposes in most instances no hardship upon the carrier. There may be cases in which a modification of this rule would be of service to the carrier without detriment to the public, and perhaps other instances in which such a modification should be granted in the interest of both the carrier and the public. This can only be accomplished by an amendment of the Act, since the provisions of that statute are mandatory, and the Commission has no power to modify their requirements.

3. If carriers are to any extent relieved from giving the notice now required of advances and reductions in rates upon foreign commerce, they should in all cases file with the Commission the rates actually made and give such further notice to the public as may be possible.

Upon the whole, we are inclined to leave this matter as it is until opportunity has been afforded carriers to adjust their tariffs and arrangements, and, if so advised, present this subject to Congress; provided, however, that in the meantime all carriers which do not publish and maintain import and export tariffs shall file with the Commission as promptly as possible a statement of the rates actually charged. It is evident that there must be uniformity in the enforcement of these provisions of the Act. One carrier cannot be expected to publish and maintain its tariffs while its competitor is relieved from that obligation. If the Act is not amended within a reasonable time, it will be our duty to enforce it as it is.

10 I. C. C. REP.

THE CATTLE RAISERS' ASSOCIATION OF TEXAS,
COMPLAINANT, AND THE CHICAGO LIVE STOCK
EXCHANGE, INTERVENER,

v.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD
COMPANY; THE CHICAGO GREAT WESTERN
RAILWAY COMPANY; THE CHICAGO & NORTH-
WESTERN RAILWAY COMPANY; THE CHICAGO,
MILWAUKEE & ST. PAUL RAILWAY COMPANY;
THE CHICAGO & ALTON RAILROAD COMPANY;
THE CHICAGO, ROCK ISLAND & PACIFIC RAIL-
WAY COMPANY; THE ATCHISON, TOPEKA &
SANTA FE RAILWAY COMPANY; THE WABASH
RAILROAD COMPANY; AND THE ILLINOIS CEN-
TRAL RAILROAD COMPANY.

Decided March 4, 1904.

1. The Act to regulate commerce clearly confers authority upon the Commission to award damages in cases brought before it, and as such award is simply a recommendation which can only be enforced by a suit at law affording full opportunity for a jury trial, the Act in this respect is, in the opinion of the Commission, constitutional and valid.
2. By its original decision herein the Commission declared that a terminal charge of \$2.00 per car on live stock for delivery to the Union Stock Yards in the City of Chicago was unlawful, and further that any such charge exceeding \$1.00 per car would be unlawful, and continued the case for proof of damages to injured parties. The decision of the United States Supreme Court upon the petition to enforce the regulating order of the Commission (*Interstate Commerce Commission v. Chicago, B. & Q. R. Co. et al.* 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. Rep. 824) in general sustained the view of the Commission but dismissed the proceeding on account of a reduction in the through rate which had been made from certain territory not described in the record before it, which reduction amounted to more than the terminal

charge, and authorized the Commission to take further proceedings to correct any unreasonableness in the rate resulting from the additional terminal charge as to any territory to which such reduction did not apply. The reduction referred to took place in 1896 and the \$2.00 terminal charge has been imposed by defendants since June 1, 1894. It follows that as to all shipping territory the defendants have, between June 1, 1894, and the date of the through rate reduction in 1896, unlawfully exacted \$1.00 per car on live stock as the terminal charge in Chicago, and that in respect to the territory in which the reduction in through rate did not apply defendants have always since June 1, 1894, collected an excessive charge in Chicago to the amount of \$1.00 per car. That branch of the case relating to reparation was properly held open pending determination of the other branch, and the decision of the Supreme Court in the case for enforcement of the regulating order of the Commission constitutes no bar to submission of proof before and action by the Commission upon the question of reparation.

3. The allegations concerning reparation in the original petition to the Commission are plainly sufficient to constitute the basis for an award of damages by the Commission, but before hearing the defendants are entitled to a specification showing in detail the amounts for which recovery is sought.
1. The Cattle Raisers' Association of Texas asked in its original petition for reparation in behalf of its members, and whatever may be said of the right or status of shippers generally as to reparation for damages resulting from a rate or charge declared by the Commission to be unlawful, in this case the Cattle Raisers' Association of Texas is entitled to show damages to its members and upon such showing it will be the duty of the Commission to order the defendant carriers to make reparation, but in view of the unsettled state of the law in this respect, and in order that all phases of the question may be presented to the court, the members of the Association seeking damages should file claim in the nature of an intervening petition showing their membership in the Association and payment by them of the charges in question, accompanied by a specification giving as definitely as possible the dates and amounts paid.
5. Where the statute establishes a method of procedure for the enforcement of a right of action which finally results in bringing that matter by the prescribed course before a court for determination, the principle established by leading cases is that the first step which must be taken in the proceeding to enforce the claim should be treated as the beginning of the suit which finally results. Therefore when a party elects to proceed before this Commission for the recovery of damages his petition filed with the Commission should be considered the beginning of his action in all its subsequent stages. In this case the suit of members of the Cattle Raisers' Association of Texas for the recovery of damages should be treated as having been begun by the filing on

their behalf of the original petition of that Association herein, and there is, consequently, no room for application of a statute of limitations.

6. The procedure in this case with respect to reparation is defined as follows: Upon proof thereof damages will be allowed in favor of members of the Cattle Raisers' Association of Texas on shipments from all territory down to the reduction in through rates of 1896, and from territory to which that reduction did not apply down to the date of hearing to be had in relation thereto, but those damages accruing before and those since the original order of the Commission herein should be shown separately, and as conditions may have changed since the date of such order, defendants will be allowed to show such subsequent facts as may now render the entire through rate, including the terminal charge, a reasonable one.
7. It was conclusively determined by the decision of the United States Supreme Court (*Interstate Commerce Commission v. Chicago, B. & Q. R. Co. et al.* 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. Rep. 824) that the addition of the \$2.00 terminal charge in Chicago on live stock from territory to which the above mentioned reduced through rate applied was not illegal, and it is now thereupon held that any subsequent advance in rates from that territory must be a matter for independent inquiry in a new proceeding.
8. No estoppel arises out of the decree of the Supreme Court in this matter with reference to further proceeding and investigation by the Commission as to the legality of the terminal charge for the future. The Commission is not *functus officio*, for the court expressly states that the Commission still has a duty to perform as to that branch of the proceeding, and the mere use by the Supreme Court in its decree of the word "commencing" with reference to further proceedings is not construed to require the formal institution of an entirely new proceeding. The case will therefore stand re-opened for further investigation and order, with leave to complainant and intervener to show to what territory the through rate reduction of 1896 applied, and if it appears that there was territory to which such reduction did not apply and from which no reduction has been made, defendants will be allowed to show, since conditions may have changed subsequent to the making of the original order, that the through rate from that territory is reasonable and just notwithstanding the addition of the terminal charge of \$2.00 per car in Chicago.
9. While all carriers participating in the through rate will be proper parties, they are not necessary parties, since the present defendants, the carriers entering Chicago, retain the terminal charge entirely to their own use.

10 I. C. C. REP.

T. W. Tomlinson and S. H. Cowan for complainants and interveners.

Charles B. Keeler and Frank B. Kellogg for defendants.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, *Commissioner*:

On June 1, 1894, the railways entering the city of Chicago imposed a charge of \$2.00 per car for the delivery of live stock at the Union Stock Yards. On September 1, 1896, the Cattle Raisers' Association of Texas filed a complaint alleging that the imposition of this charge was unreasonable and unjust and asking that the Commission order the carriers to cease and desist from imposing it; further asking that reparation be awarded to members of the complainant association who had been or might be compelled to make such payment. On March 10, 1897, the Chicago Live Stock Exchange intervened in favor of the complainant and thereafter the case was jointly prosecuted by these two associations. The Exchange did not in its intervening petition ask reparation, but did pray that the carriers might be required to cease and desist from imposing the terminal charge and for other relief in the premises. After investigation the Commission decided, January 20, 1898, that the charge was unreasonable to the amount of \$1.00 per car and an order was made requiring the defendants to cease and desist from collecting the charge of \$2.00. 7 I. C. C. Rep. 513. Thereupon the defendants moved for a rehearing which motion was denied August 4, 1898. 7 I. C. C. Rep. 555a. The order of the Commission which had been suspended during the pendency of the motion for a rehearing was now renewed.

The defendants having declined to comply with this order a bill was filed in the Circuit Court for the Northern District of Illinois to enforce obedience. That court dismissed the petition and an appeal was taken to the Circuit Court of Appeals where the judgment of the lower court was affirmed. Thereupon an appeal was again taken to the Supreme Court of the United States. This court also affirmed the judgment of the court below but with the following qualification.

10 I. C. C. REP.

The Commission held in the original proceeding that the cost of delivery previous to June 1, 1894, had been included in the through rate, that the imposition of the terminal charge was an arbitrary addition to that rate, that owing to the increased cost of making delivery the carriers were justified in adding \$1.00 to the through rate, but that the remainder of the charge, \$1.00 per car, was unlawful. In 1896 through rates to Chicago from certain points involved had been reduced 5 cents per hundred pounds, amounting to from \$10.00 to \$15.00 per car, and this fact was mentioned in the report of the Commission. The Supreme Court held that the finding of the Commission that a delivery had been included in the rate previous to June 1, 1894, was correct; that there was no justification for an increase of the through rate by the addition of more than \$1.00 as found by the Commission, and that therefore the total rate was \$1.00 too high. But inasmuch as it appeared that in some instances the through rate had been reduced by a much greater sum than the increase the court was of the opinion that the total rate including the terminal charge from territory to which the reduction applied was reasonable, and that since the report of the Commission did not define that territory no basis existed for modifying and enforcing its order even though that could otherwise have been done. The court stated, however, that its action in dismissing the bill was without prejudice to the right of the Commission to correct this unreasonableness as to that territory to which the reduction did not apply. The language of the court in stating this last proposition was as follows:

“It follows that the decree of the Circuit Court of Appeals, which affirmed the decree of the Circuit Court, refusing to command compliance with the order of the Commission, was right, and it must, therefore, be affirmed. We think, however, in view of what has been said, and in order to prevent all possible misconception, that it should be stated that nothing in the decree refusing to execute the order of the Commission should be construed as preventing that body, if it deems it best to do so, from hereafter commencing proceedings to correct any unreasonableness in the rate resulting from the additional terminal charge as to any

territory to which the reduction referred to in the opinion, if any such there be, did not apply.

The decree of the Court of Appeals is therefore affirmed without prejudice to the right of the Commission to hereafter proceed in accordance with the reservation expressed in the opinion just announced."

Interstate Commerce Commission v. Chicago, B. & Q. R. Co.
186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. Rep. 824.

In originally disposing of the case the Commission did not consider the question of reparation but said, "We shall therefore continue the case for proof of damages, reserving all questions as to reparation until that proof is made."

On February 28, 1903, after the promulgation of its opinion by the Supreme Court of the United States, the Cattle Raisers' Association and the Chicago Live Stock Exchange filed a joint petition asking the Commission to re-open the case for the purpose of making a further order with respect to the imposition of this terminal charge, and also that it proceed to take proof as to damages and award reparation. Upon the filing of this petition the Commission made an order re-opening the case for further hearing and served a copy of the petition and its order upon the defendants, requiring them to answer within a time specified. Instead of answering, the defendants filed a motion to vacate the order re-opening the case and the present discussion is upon that motion.

The order of the Commission to further proceed in this case contemplated two things; first, the awarding of damages to such parties as might be entitled thereto; second, the making of a new order to cease and desist with respect to that territory which was excepted from the decision of the Supreme Court of the United States if the facts should so require. These two things are entirely distinct and should be considered separately.

The Act to regulate commerce provides that any person suffering damage by failure of a common carrier subject thereto to obey its provisions, may apply to the Commission, which is required to ascertain what damage the complainant has sustained, if any, and to order the carrier to make reparation in the premises. The defendants insist at the outset, with great earnest-

ness, that this portion of the act is unconstitutional in that it imposes upon an administrative body judicial functions. While the arguments by which this contention is supported have been urged with great ability it is our impression that the point is not well taken. The order for reparation is not obligatory upon the carrier. It amounts simply to a recommendation which can only be enforced by a suit at law in which full opportunity for a jury trial is accorded. Plainly, Congress, having jurisdiction of this subject, might create a body with authority to inquire whether this act had been violated, and what damages had been sustained. It might probably make the report of that body prima facie evidence in a suit brought by the person sustaining these damages for their recovery, so long as there was preserved to the defendants a trial by jury in due form of law. We do not however deem it profitable to examine the authorities cited in detail. The act creating this Commission clearly confers that authority and it is our duty to proceed as the statute requires, unless the unconstitutionality appears beyond reasonable doubt, certainly when, as here the parties affected cannot be injured by the exercise of such jurisdiction. No order of the Commission awarding damages can be enforced against these carriers, not a dollar of their property can be taken, except by the judgment of a court in which this question can be raised and passed upon. We hold, therefore, that the act is constitutional and valid in this respect:

The defendants next insist that if the Commission has authority to award reparation it cannot exercise that power in the present case for the reason that this proceeding has been finally ended by the decision of the Supreme Court of the United States, and cannot be revived. As already suggested this Commission may under the act make orders of two kinds. It may make an administrative order which refers to the future, or it may award damages for what has transpired in the past. The purpose and scope of these two orders is entirely different. The methods of enforcing them are equally distinct. In one case application is made to a court of equity which determines all questions of fact and employs, if need be, its mandatory

10 I. C. C. REP.

powers in the enforcement of the orders. In the other case a suit at law is brought, in which the issue of fact is decided by jury. These two orders may be made in the same case, but they are in no way connected and the right to make one is not necessarily conclusive of the right to make the other. If for example upon a complaint alleging the unreasonableness of a rate and demanding reparation the Commission should find the rate unreasonable and order the carrier to charge for the future a given rate which was determined to be reasonable, that order would be invalid because beyond the power of the Commission, and the court would decline to enforce it, but the refusal of the court to enforce such an order would be no bar to the right of the Commission to grant reparation to the extent that the carrier had exacted more than a reasonable rate in the past.

It is said that this case has ended; but this is in no sense true of the claim for reparation. That has been in express terms kept alive. The case was continued for proof of damages, and this was so stated upon the record, the idea being that if the court finally held that the imposition of the terminal charge was legal, this would be conclusive against the right to reparation, and nothing more would be done, while if the court held that the charge was illegal, then the case might be intelligently proceeded with in the light of that holding. Now the court has said that the exaction of this terminal charge to the amount of \$1.00 per car was illegal, except when and where there had been a reduction in the through rate amounting to more than the terminal charge itself. This reduction was not made until 1896 from any territory as the case shows. It must follow therefore that from June 1, 1894, until that date in 1896 when the rate was reduced, these defendants were exacting from shippers \$1.00 per car, to which they had no legal right. It further follows that with respect to territory to which the reduction did not apply the defendants have always collected \$1.00 per car beyond a just charge. Why should not the right of the complainants to recover the amounts so illegally exacted be recognized in this proceeding at this time?

Beginning June 1, 1894, these defendants collected from shippers of live stock making delivery at the Union Stock Yards

10 I. C. C. REP.

in Chicago \$1.00 per car in violation of the Act to regulate commerce. Certain shippers in September, 1896, began proceedings in accordance with this act to recover the amount so extorted. Those proceedings have been prosecuted with due diligence since and the claim of the complainants has never been passed upon by the Commission or by the Court, except that both Court and Commission have decided that the exaction was illegal. It is now claimed that by some sort of legal legerdemain the complainants have no right to a decision of that question in the suit which was then begun. If so they are without redress, for the statute of limitations, if there be such a thing applicable to such a right of action, has long since run. This view of the law does not commend itself to our sense of justice. We have no doubt that this branch of the case was properly held open pending the determination of the other branch, and we have no doubt that these complainants may now ask the Commission to proceed to determine whether damages should be awarded upon their original complaint. This is not a re-opening of the case in this particular; as to this question the case has never been closed.

The defendants urge that this complaint contains no sufficient allegations upon which to base a claim for reparation. There is no statement of amount or date or particular shipment upon which payment has been made and the defendants insist they are not sufficiently advised of what will be claimed to enable them to prepare their defense.

This Commission, as the defendants have so forcibly stated in the course of this discussion, is not a judicial, but rather an administrative body. It is authorized by the act creating it to make rules for the conduct of its business and to alter those rules from time to time. It may well have been in contemplation that such a body proceeding without the formalities of judicial trial might arrive at a conclusion with less expense and delay than a court. At the same time the duty of the Commission in the assessing of damages is *quasi* judicial. While its order for the payment of damages is nothing more than a recommendation which is to be treated as *prima facie* evidence in a suit for the collection of such damages, nevertheless, in the
10 I. C. C. REP.

nature of things the carrier would seldom care to submit its case anew to a jury and if it did so would be seriously prejudiced by the finding of the Commission. The railway must as a practical matter try the questions of fact in its case before the Commission and it should be furnished with whatever information it needs to intelligently prepare its defense.

The allegations in the present case, so far as they bear upon the question of reparation, are that the defendants have exacted and are continuing to exact an illegal charge, which is definitely described, and that the complainant, in so far as it has been or may be compelled to pay that charge, will seek a recovery of the amount paid. Dates and amounts are not given nor could they have been for the most part at the time the complaint was filed, since the claim for reparation looked to the future as well as to the past, but there is a definite statement of the exact thing for which a recovery is sought. Passing for the moment over the question of parties, or who may recover damages under this complaint, we think the allegations are plainly sufficient. The information which is furnished by this complaint is to every practical intent more definite and more extensive than that furnished by the common counts in an action at law. We must not be understood that these defendants should be compelled to go to trial upon the subject of reparation in the present state of this record. Before then a specification should be filed showing in detail the amounts for which a recovery is sought. Up to the present time no such specification has been asked for and we cannot perceive that the defendants have been in any way prejudiced by failure to file one. They have been advised of the precise nature of the claim of the complainants and their own records show every instance in which this payment has been made. If they have suffered the destruction of any of those records it has been with full notice of their materiality.

A more serious question is, are there any proper parties in this proceeding to whom damages can be awarded, and if not can the persons who are entitled to these damages become parties at the present time. Neither the Commission nor the courts have ever had occasion to pass upon this exact question so far as

can be ascertained. In deciding it, the act itself must be our guide.

Section 8 provides that if any common carrier subject to the provisions of the act does or omits to do anything in contravention thereof, it shall be liable to the person injured for the full amount of the damages, together with a reasonable counsel or attorney's fee to be fixed by the court and taxed and collected as a part of the costs in the case. Section 9 states that any person claiming to be damaged may either sue in court or proceed before the Commission, but must elect the forum. The section further provides for the production of witnesses and documents before the court. These two sections create a right of action and provide for its enforcement by legal proceedings; they also provide that proceedings for the recovery of damages may be instituted before the Commission, but have no reference to the method or manner of beginning and conducting such proceedings, this being covered by sections 12 to 16 inclusive.

The 12th section provides that the Commission shall execute and enforce the provisions of the act; and that it shall have authority to inquire into the manner and method pursued by carriers subject to the act in the conduct of their business, provision being made in comprehensive terms for the obtaining of testimony by the production of witnesses and documents or by deposition in all inquiries and investigations pending before the Commission. Section 13 is important in its bearing upon the question before us and is given entire.

"That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time

specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall, in like manner, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall, at any time, be dismissed because of the absence of direct damage to the complainant."

The first paragraph of section 14 reads as follows:

"That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found."

Section 15 is quoted entire:

"That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this Act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining or by other parties aggrieved in consequence of any such violation, it

10 I. C. C. REP.

this reparation be awarded. Plainly a trade association, a municipality, an agricultural society, a railroad commission, pays no freight money. Now in case complaint be made by a complainant of this character against the unreasonableness of a rate and that complaint is sustained, can damages be given? The defendant insists that this cannot be done; that damages can only be awarded to a party who has paid the rate and who brings and prosecutes the complaint. The complainant insists that it may be done, that when once, upon proper complaint and after proper hearing, it has been determined that a particular rate is unreasonable, any shipper who has paid that rate may enter in that proceeding, prove the fact and amount of payment, and have the benefit of an order for reparation.

Much may be said in favor of the position of the complainant. The act itself requires that rates shall be the same to all shippers. Two questions are involved in a suit to recover for the payment of an unreasonable rate; first, is the rate unreasonable; second, has the party seeking the recovery paid the rate. The first question is common to every proceeding for the recovery of the same rate. If that be unreasonable as to one it is unreasonable as to all. When that question has been litigated and decided in a particular suit, what reason is there why every one who has paid that rate should not be allowed to appear in that suit prove his damages and obtain his order? If the date of the appearance be treated, as it probably should be in case of a party in no way identified with the original proceeding, as the beginning of a suit by that party to collect these damages, how could the carrier be prejudiced by this method of procedure? As already said, the defendant must be fully notified of the amount claimed and of all those circumstances attending the payment which are necessary to enable it to prepare its defense; but why should the claimant be compelled to relitigate the question of the reasonableness of the rate which has once been decided? It may be possible to imagine instances in which this would work hardship or inconvenience, but these could be provided against since the permission to intervene would be allowable in the discretion of the Commission.

We do not find it necessary, however, to pass upon this question.
10 I. C. C. REP.—7.

U. S. C. R.

a quarter of a million dollars annually. The shipper is usually of small means, the railway of vast resources. It is plain that the mere right to sue in court and recover back an unreasonable rate affords the public in most cases no substantial protection. The one who pays the freight cannot afford to sue; will not sue, as the history of a half century proves. While the exactions of railroads during that period have been sufficient to produce political revolutions, there are few, if any, instances in which a suit to recover an unreasonable rate has ever been prosecuted to final judgment. Beyond question one of the purposes of this Act was to provide a means for the protection of the public against the exactions of railways, and one method adopted for the accomplishment of this purpose was to permit those who have a common interest to combine in the prosecution of that interest. The 13th section demonstrates this. Not merely the individual shipper who is injured, but the municipality, the industry, the voluntary association, the state railroad commission, may institute complaint, and when such complaint has been made this Commission is instructed, if there appears reasonable ground for so doing, "To investigate the matters complained of in such manner and by such means as it shall deem proper."

If, as the result of such investigation, it turns out that the carriers are in violation of law the Commission may order them to cease and desist from such violation in the future. It may also direct that reparation be made for damages sustained in the past; and it is evident that the awarding of damages held a conspicuous place in the mind which designed this act. The 14th section provides that the Commission shall, in all cases, make a report of its conclusions, which shall include "Its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured." It is provided by the 15th section that if, in the course of an investigation, it is made to appear "That any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation," it shall be the duty of the Commission to order reparation. The question now before us is, to whom can

this reparation be awarded. Plainly a trade association, a municipality, an agricultural society, a railroad commission, pays no freight money. Now in case complaint be made by a complainant of this character against the unreasonableness of a rate and that complaint is sustained, can damages be given? The defendant insists that this cannot be done; that damages can only be awarded to a party who has paid the rate and who brings and prosecutes the complaint. The complainant insists that it may be done, that when once, upon proper complaint and after proper hearing, it has been determined that a particular rate is unreasonable, any shipper who has paid that rate may enter in that proceeding, prove the fact and amount of payment, and have the benefit of an order for reparation.

Much may be said in favor of the position of the complainant. The act itself requires that rates shall be the same to all shippers. Two questions are involved in a suit to recover for the payment of an unreasonable rate; first, is the rate unreasonable; second, has the party seeking the recovery paid the rate. The first question is common to every proceeding for the recovery of the same rate. If that be unreasonable as to one it is unreasonable as to all. When that question has been litigated and decided in a particular suit, what reason is there why every one who has paid that rate should not be allowed to appear in that suit prove his damages and obtain his order? If the date of the appearance be treated, as it probably should be in case of a party in no way identified with the original proceeding, as the beginning of a suit by that party to collect these damages, how could the carrier be prejudiced by this method of procedure? As already said, the defendant must be fully notified of the amount claimed and of all those circumstances attending the payment which are necessary to enable it to prepare its defense; but why should the claimant be compelled to relitigate the question of the reasonableness of the rate which has once been decided? It may be possible to imagine instances in which this would work hardship or inconvenience, but these could be provided against since the permission to intervene would be allowable in the discretion of the Commission.

We do not find it necessary, however, to pass upon this question.
10 I. C. C. REP.—7.

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tion in the present case. The only parties asking reparation are the members of the Cattle Raisers' Association of Texas. This association was the original complainant and asked in its original petition for reparation in behalf of its members. It is not an incorporated body and probably could not prosecute in court a suit for the enforcement of an order for reparation if one were made in its behalf. It does not ask for such an order in its own behalf, but it asks that it may be allowed to make proof that its members have paid this illegal charge, and that thereupon the Commission direct the carriers to refund to such persons the illegal exaction.

We are inclined to sustain the position of the complainant to this extent. Some effect should be given to the words of the 14th and 15th sections above quoted. This association is a proper party complainant. It filed its complaint in due form of law alleging, among other things, that its members were being compelled to pay this illegal charge and asking that the carriers be ordered to make restitution to them. We think that under that complaint the association should be permitted to show that its members have sustained this damage, and that when this has been done it will be our duty to make an order upon the carriers for the repayment of these exactions. It will have appeared in the investigation of this complaint, upon lines entirely within the original complaint, that damage has been sustained by certain parties who are thereupon entitled to an order for reparation. Unless this can be done it is difficult to see what advantage is offered by proceeding before the Commission in the collection of damages. No counsel fee is allowed and subsequent suit must be brought in court to enforce the order. While this question has never been formally discussed and decided by the Commission, hitherto it has been our practice to order reparation in behalf of the members of complaining associations. *Independent Refiners' Asso. v. Western New York & P. R. Co.* 6 I. C. C. Rep. 378; *Board of Trade of Lynchburg v. Old Dominion S. S. Co.* 6 I. C. C. Rep. 633.

Since the law in this respect is unsettled and in order that all phases of this question may be presented to the court it would probably be well for the members of this association who

10 I. C. C. REP.



seek damages, to file a claim in the nature of an intervening petition stating that they are members of the association, have paid the charges in question and seek to recover the same in this suit. Such statement should also be accompanied by a specification giving as definitely as possible the dates and amounts paid.

The defendants insist that if the individual members of the Cattle Raisers' Association, or any other persons who have paid this terminal charge, are allowed to recover in this suit the amount of such payments, then their appearance in the case must be treated as the beginning of a new action as of the date of such appearance, and that, therefore, a very considerable part of such claims would be barred by the statute of limitations. It is not definitely pointed out what statute of limitations would apply nor within what time such claim would be recoverable. The complainant meets this by saying that at common law there was no limitation of actions; that there is no limitation upon this right of action, which is created by a federal statute, unless imposed by some other federal statute; that the judiciary act prescribes the rule of limitation which shall be enforced in the federal courts, but that such act does not apply to this Commission since it is not a court; that no other statute fixes a limit of time within which claims like that under consideration shall be presented to the Commission, hence there is no such limitation.

It seems to be true that no statute of limitations existed at common law; the Supreme Court of the United States has declared that but for the judiciary act there would be no time limit to the bringing of personal actions in the federal courts. *Michigan Insurance Bank v. Eldred*, 130 U. S. 693, 32 L. ed. 1080, 9 Sup. Ct. Rep. 690. The defendants themselves insist that this Commission is not a court, and this being so the judiciary act cannot apply to proceedings before it. We are inclined to agree with the complainant to this extent, although it might not be a violent presumption to say that while the Commission is not and cannot be a judicial body in the strict sense of that term, still when Congress invested it with its present duties, when it provided that suits for recovery of these damages might

10 I. C. C. REP.

be prosecuted either before the court or before the Commission, it intended to provide that the same rule of limitation should obtain in whichever forum the suit was begun. On the whole we do not think that the terms of the judiciary act in this respect would apply to the Commission; but does it follow from this that there is no limitation upon the time within which such suits shall be brought before it?

The act provides that a party sustaining these damages may either bring suit in court or apply to the Commission at his election. If he brings suit in court in the first instance the statute of limitations prevailing in that state in which the suit is brought applies. On principle this conclusion must follow and such have been the adjudicated cases. *Copp v. Louisville & N. R. Co.* 50 Fed. 164; *Ratican v. Terminal R. Asso.* 114 Fed. 666. If, however, suit is commenced before the Commission resulting in an order, for the enforcement of which application is made to that same court no statute of limitations would apply according to the theory of the complainant. Hence it must follow that by simply varying the manner of prosecuting his claim a party may determine whether the court giving final judgment shall or shall not apply a period of limitation.

Again, while it is true that there was no statute of limitations as such at common law, equity refused to enforce stale claims and law courts presumed payment after a lapse of 20 years; while there may be no limitation of actions today except by statute, such statutes are universal and it would be difficult to find a right of action which has not also some limitation of the time within which suit for the enforcement of that right must be brought. But if the complainant is right violations of the Act to regulate commerce may be prosecuted before the Commission without reference to the time when they accrued. While the failure to provide such a time limit would not nullify the statute, no such construction should be accepted unless irresistible.

No order which the Commission makes is of binding effect unless enforced by proceedings in court. It would neither be the duty of the Commission nor of profit to the complainant to make an order which the court would not enforce. If, therefore,

10 I. C. C. REP.

100

it were possible to ascertain what rule of limitation the court would finally apply the same rule should be followed by us. It has already been noted that if suit be brought in the first instance in court the statute of that state in which the suit is pending would be applicable. Would the same rule apply where the proceeding was begun before the Commission? The cause of action is really the same in both cases for this arises out of a breach of the statute and not from the order of the Commission.

Counsel for the complainant answers that it is not the accruing of a cause of action, but the right to begin an action which puts in operation the running of a statute of limitations. If the complainant elects to proceed before the Commission he cannot begin his suit in court until the order of the Commission has been made and the defendants have refused to obey it. Hence in a suit brought to enforce an order of the Commission the running of the statute dates not from the payment of the freight money, but from the time when the carrier was in disobedience of the order of the Commission.

If the service of the petition to the Circuit Court for the enforcement of the order were to be treated as the beginning of that suit we should agree with this proposition, for otherwise a claimant electing to proceed before the Commission, as by statute he may, and beginning such proceeding while his claim was yet alive might find himself barred before he could obtain an order and file his petition for its enforcement, although proceeding with all diligence. We think, however, that the suit in court is not begun when the petition to enforce the order is filed, but rather by the filing of the original petition to the Commission. While this Commission is not a court to which the judiciary act applies it may be so far an adjunct of the court, so far a part of the scheme by which these damages may be recovered, that the filing of the petition before the Commission may properly be considered a commencement of the litigation which finally results in a suit before the court. In considering this it may be well to have in mind the exact language of the 16th section providing for the enforcement of such orders, which is as follows:

10 I. C. C. REP.

"If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the Circuit Court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty nor more than forty days from the time said order is made, and it shall be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid. At the trial the findings of fact of said Commission as set forth in its report shall be prima facie evidence of the matters therein stated, and if either party shall demand a jury or shall omit to waive a jury the court shall, by its order direct the marshal forthwith to summon a jury to try the cause; but if all the parties shall waive a jury in writing then the court shall try the issues in said cause and render its judgment thereon."

A consideration of the above language shows that while the cause of action upon which the suit at law is based is not the order of the Commission, and while the issue before the court is whether there has been a breach of the Act to regulate commerce, still the suit in court is a continuation of the proceedings before the Commission. If the party injured elects to take his remedy before the Commission he must begin his suit there;

10 I. C. C. REP.

he can begin it in no other way; and the subsequent proceedings in court are a continuation of the suit which he begins there. Congress had complete control of this subject. It might have enacted that the beginning of proceedings before the Commission should be treated as the beginning of the suit subsequently brought in the Circuit Court. It seems to us the least difficult way out of the many difficulties besetting the solution of this question to hold that Congress did in effect so provide, and that the filing of the petition before the Commission is the beginning of the suit which is finally brought in the Circuit Court to enforce an order for reparation made by us.

Nor is such a conclusion entirely unsupported by analogy. A statute of the United States provides that certain claims against the United States shall be presented to the various executive departments for settlement, and that these departments may, where controverted questions of law are involved, certify the claim to the Court of Claims for decision. It is further provided that claims prosecuted before the Court of Claims shall be barred unless the petition is filed in that court within six years from the time when the claim accrues. The State of New York filed in the Treasury Department a claim against the United States in 1862. On January 3, 1889, this claim was certified to the Court of Claims for adjudication, and it was insisted on behalf of the Government that the claim was barred by the statute of limitations. The Supreme Court of the United States held, however, that the petition transmitting the claim to the Court of Claims must be held to relate back to the date of filing the claim with the Treasury for settlement, and that this date should be regarded as the beginning of the suit in that court. *United States v. New York*, 160 U. S. 598.

The statute of Massachusetts directed that claims against the estates of deceased persons should be presented to the commissioners upon said estates; that if the administrator was dissatisfied with the allowance of such claims by the commissioners he should notify the claimant, who thereupon was required forthwith to commence his action in court if he desired to prosecute his claim. Under this statute it was held that the presentation of a claim to the commissioners was a beginning of the suit which

10 I. C. C. REP.

was subsequently brought in court. *Guild v. Hale*, 15 Mass. 455.

The principle of these cases seems to be that where the statute establishes a method of procedure for the enforcement of a right of action which finally results in bringing that matter by the prescribed course before a court for determination, the first step which must be taken in the proceeding to enforce the claim should be treated as the beginning of the suit which finally results. So here, if a party elects to proceed for the recovery of his damages before the Commission he must file his petition with it, and that should be considered the beginning of his action in all its subsequent stages.

Without doubt there are practical difficulties in the way of an application of this rule. It often, perhaps usually, happens that an order for reparation may be enforced in several jurisdictions in which the period of limitation may differ. Not knowing in what jurisdiction suit will be brought the Commission cannot determine what statute of limitations should be applied by it. This difficulty is, however, more apparent than real, since the Commission would probably follow the indication of the claimant that he intended to pursue his remedy in a particular forum.

While the statute of limitations has been discussed at some length we desire to repeat that in our opinion it has no application to the present case. Assuming that the members of the Cattle Raisers' Association should be treated as intervening petitioners now appearing by name upon the record for the first time, still we think, as to them, this suit was begun by the filing of the original petition. It is like a creditors' bill brought by a single creditor for the benefit of all, which interrupts the running of the statute as to all those who subsequently come in and prove their claims. *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788. This proceeding was expressly begun for this purpose on account of the members of this association and they ought to have the benefit of it.

It is alleged that rates have been advanced from that territory to which the reduction applied so that the total rate is now higher than it was when the terminal charge was first added

and we are asked to inquire into this. The idea, apparently, is that if a reduction nullified the effect of the terminal charge, a subsequent advance should restore things to their original position. We think, however, that it was conclusively determined by the decision of the United States Supreme Court that the addition of this terminal charge from territory where the reduction was made was not illegal at a certain time. Any advance in rates from that territory since must be a matter of independent inquiry and should be by a new proceeding.

We will allow damages in favor of the members of the Cattle Raisers' Association of Texas from all territory down to the reduction of 1896, and from territory to which that reduction did not apply down to the present time. There may be some question whether these damages should extend beyond the date of our original order, but we think that the presumption is that the condition of things continues as it then existed, and that the complainants should be allowed damages in this accounting up to the date of hearing. Those accruing before and those since the order should, however, be kept separate so that, if this opinion turns out to be wrong, the whole order will not be vitiated. Since conditions may have changed since the date of that order the defendants will be allowed to show, if they desire, such subsequent facts as make now the entire through rate, including the terminal charge, a reasonable one.

The Chicago Live Stock Exchange did not claim reparation in its petition of intervention. If that association desired to so amend its petition at the present time as to ask for reparation we should probably permit the amendment. Our impression is that such an amendment would introduce a new cause of action and that the date of the amendment ought probably to be regarded as the beginning of proceedings for the recovery of reparation by the members of that association, but we should be inclined to receive proof of damages accruing at all times since the imposition of the terminal charge, separating the items in such way that the court might finally pronounce the proper judgment. It should be noted that if we err against the complainant there is no way in which the error can be corrected, while if we err against the defendants that mistake can be cured

10 I. C. C. REP.

by the court in proceedings brought to enforce our order. We are inclined in the present uncertain state of the law to afford the complainants an opportunity to secure from the court an authoritative interpretation of the act in these respects.

We will proceed in the matter of reparation as above indicated. As already noted, this is not a re-opening of the case, for upon this branch it has never been closed.

We are also petitioned to re-open this case for the purpose of inquiring from what territory rates were not reduced with a view to making a new order requiring the defendants to cease and desist from making this charge as to the shipments from that territory. This presents an entirely different question. The power of the Commission to make an order for reparation has never been exercised; it has made an administrative order requiring the defendants to desist from imposing this terminal charge and the courts have refused to enforce that order. Can it make another order in the same proceeding? The defendants say not, and invoke the rule of *res judicata*.

The principle of judicial estoppel as such can hardly apply to the decisions of the Commission in a case like this. That doctrine is founded upon the rule of public policy that litigation must have an end. It is better that now and then a controversy should be decided wrong than that all controversies should be left open indefinitely. This necessarily further assumes that the right decision of a given question is the same at all times. Such is not the case with questions like that here presented for the consideration of the Commission. There is no absolute rule by which the reasonableness of a rate can be determined. That depends upon competitive, commercial and operating conditions which are continually varying. A conclusion eminently proper upon the facts of today would, perhaps, be entirely wrong tomorrow. The authority which is exercised by the Commission in the making of an order to cease and desist from charging a particular rate is rather administrative than judicial and in the nature of things of a continuing character. It would be most unfortunate both for the railway and the public and most illogical to apply to the exercise of that power the doctrine of *res judicata*.

This does not mean that the Commission will re-try the same question. Upon the other hand when a certain situation has been fully considered and a decision reached that decision will ordinarily control in the absence of changed conditions both between the same parties and between other parties; this, however, not as a matter of law, but as a matter of discretion. *Railroad Commission of Kansas v. Atchison, T. & S. F. R. Co.* 8 I. C. C. Rep. 304, 308.

The defendants insist that if there is no absolute estoppel upon the record, still the Commission is without authority to proceed in this case because its power in that behalf has been exhausted; having once passed upon the question presented it is *functus officio*. In support of that proposition our attention is called to several cases in which it is held with respect to various bodies like boards of audit, supervisors, commissioners for the assessment of damages and such like, that having once acted upon a given matter, and published their decision according to the statute creating them, they cannot reconsider that action. The case, *Union Terminal R. Co. v. Board of Railroad Commissioners of Kansas*, 54 Kan. 352, 38 Pac. 290, is especially referred to.

The statute of Kansas provided that where one railroad desired to cross another it might apply to the Board of Railroad Commissioners, which should, upon inquiry, determine the necessity for the crossing, fix the manner and award the damages. The Union Terminal Company, desiring to cross certain tracks in the vicinity of Kansas City, Kansas, made application to the Board of Railroad Commissioners who heard the case, granted the right to cross, specified the manner in which the crossing should be made, and awarded damages to the various companies whose lines were crossed. Under the statute an appeal would lie from this decision, but none was in fact taken, and the Terminal Company proceeded to expend large sums of money with a view to crossing in the manner indicated. Some four months after the award, the personnel of the board having entirely changed, another petition was preferred by the railroad companies, defendants in the first proceeding, asking the Commissioners to review that matter and make a new and different

10 I. C. C. REP.

order in the premises, which the commissioners were proceeding to do when suit was brought for an injunction. The court granted the injunction upon the ground that, when the commissioners had made their award from which no appeal had been taken, their power in the premises was exhausted. It was urged that the duties of the Board of Railroad Commissioners were continuing and that therefore it might revise its decision from time to time as justice demanded. But the court held that, whatever might be true of some duties of that Commission, the duty which it exercised in the instance under consideration was merely that of a condemnation board in the exercise of the right of eminent domain. It was distinctly upon this ground that the case was put, and it is in no sense an authority for the proposition that a board of commissioners charged with the supervision of railway rates may not revise its conclusions from time to time with varying conditions, but rather the contrary.

But neither of the above claims of the defendants, even though legally correct, are applicable to the facts in this case, and it is important to notice exactly what those facts are. This Commission held that the total through rate was unreasonable by the amount of \$1.00, because the carriers had added that sum to the former rate without any corresponding increase in the cost of service and without other justification; and the Supreme Court has approved that finding. But it appeared in the opinion of the Commission that for some reason the rate had been reduced from certain territory, subsequent to the imposition of this terminal charge, by an amount considerably greater than the charge itself, so that the total rate from such territory was less than before the terminal charge was imposed. It did not appear to what territory this reduction applied. The court held that since the reduction more than offset the increase the total through rate was not unreasonably high, and further that, inasmuch as the opinion did not define the territory to which the reduction applied, the court was without the means of properly modifying and enforcing the order of the Commission. It therefore dismissed the bill, but with the express reservation that such action should in no respect foreclose the right of the Commission to correct the unreasonableness with respect to that

territory from which no reduction had been made. No estoppel can arise out of that decree, for the decree itself in terms declares the contrary; the Commission is not *functus officio* for the court expressly states that it still has a duty to perform. The real question is, not can the Commission correct this wrong, if found to exist, but can it do it in this proceeding or must it begin *de novo*? The defendants insist that by using the word "commence" the court has in effect directed that an entirely new proceeding should be begun.

The statute provides that this Commission may make rules for the conduct of its business, and the court will hardly presume to dictate as to those rules, so long as the rights of all parties are protected. In the matter before us every reason of convenience requires that the case should be re-opened. A great mass of testimony has been taken, the questions at issue have been elaborately argued, voluminous facts have been found—all of which must be done over if a new complaint is filed. We are unable to perceive how the rights or interests of these carriers can be in the slightest degree prejudiced by re-opening this case, instead of beginning a new one. In several instances where the suit to enforce an order has been dismissed, the Supreme Court of the United States has expressly said that the Commission might proceed upon the record already before it, either with or without additional testimony, thereby recognizing the propriety of such a method of procedure. *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; *Interstate Commerce Commission v. Clyde S. S. Co. et al.* 181 U. S. 29, 45 L. ed. 729, 21 Sup. Ct. Rep. 512; *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516.

We cannot believe that the Supreme Court by incidentally using the word "commence" meant to constrain the Commission in this respect.

The case will, therefore, stand re-opened, with leave to complainants and the intervener to show to what territory the reductions of 1896 applied. If it appears that there was territory to which these reductions did not apply and from which no reduction has been made the defendants will be allowed to show, owing

10 I. C. C. REP.

to the fact that conditions may have changed since the making of the original order, that the through rate from that territory is reasonable and just notwithstanding the addition of the terminal charge.

We are asked to bring in the carriers forming parts of the through lines from points of origin to Chicago. This does not, however, seem necessary. As appears in the original case, the carriers entering Chicago, who are the defendants upon whom notice has been served, retain this charge entirely to their own use. While carriers participating in the through rate would be proper parties, they are not necessary parties. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct Rep. 666.

10 I. C. C. REP.

THE CHAMBER OF COMMERCE OF CHATTANOOGA

v.

THE SOUTHERN RAILWAY COMPANY, THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY, THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, THE CHESAPEAKE & OHIO RAILWAY COMPANY, THE GEORGIA RAILROAD, THE CENTRAL OF GEORGIA RAILWAY COMPANY, THE NORFOLK & WESTERN RAILWAY COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, THE MERCHANTS & MINERS TRANSPORTATION COMPANY, THE CLYDE STEAMSHIP COMPANY, AND THE OCEAN STEAMSHIP COMPANY OF SAVANNAH.

Decided March 12, 1904.

The Commission having decided in *Board of Trade of Chattanooga v. East Tennessee, V. & G. R. Co.* 5 I. C. C. Rep. 546, 4 Inters. Com. Rep. 213, that freight rates from New York and other eastern points were unlawfully higher for the shorter distance to Chattanooga than for the longer distance through Chattanooga to Nashville, and the United States Supreme Court having, in a proceeding to enforce the order of the Commission, refused to direct enforcement of such order and reversed the decisions of the Circuit Court and Circuit Court of Appeals in that proceeding, but "without prejudice to the right of the Commission" to proceed further and "hear and determine the matter in controversy according to law" (181 U. S. 29, 45 L. ed. 729, 21 Sup. Ct. Rep. 512), and the case having come before the Commission for re-investigation upon complaint of the Chamber of Commerce of Chattanooga against lines involved in the original proceeding and also lines reaching Chattanooga and lines reaching Nashville via Cincinnati, it is found, applying the

law as construed by the United States Supreme Court, that the traffic from New York and other eastern points is carried to Nashville and Chattanooga under substantially different circumstances and conditions, and *held* that the higher rate to Chattanooga is not unlawful under section four of the statute and cannot be otherwise condemned merely because a lower rate is granted to Nashville, and that the rates to Chattanooga are not shown to be unreasonable within the meaning of section one of the Act.

L. A. Shaver for complainant.

Ed. Baxter for defendants.

REPORT AND OPINION OF THE COMMISSION.

KNAPP, *Chairman*:

This is in effect a re-investigation of the case before the Commission of the *Board of Trade of Chattanooga v. East Tennessee, V. & G. R. Co.* 5 I. C. C. Rep. 546, 4. Inters. Com. Rep. 213. The carriers having refused to obey the order of the Commission in that case, suit for its enforcement was instituted under section 16 of the Act to regulate commerce in the Circuit Court of the United States for the Eastern District of Tennessee. The circuit court rendered a decree enjoining the carriers from further disobedience to the order and, on appeal by the carriers, the Circuit Court of Appeals for the Sixth Circuit affirmed the decree of the circuit court. The case having been taken to the Supreme Court by the carriers, that court reversed the courts below and rendered a decree, remanding the case to the circuit court with directions that the bill of complaint of the Commission be dismissed, but that the dismissal should be "without prejudice to the right of the Commission to proceed upon the evidence already introduced before it or upon such further pleadings and evidence as it may allow to be made or introduced, to hear and determine the matter in controversy according to law." (181 U. S. 29, 45 L. ed. 729, 21 Sup. Ct. Rep. 512.)

This re-investigation is in pursuance of the suggestion of the Supreme Court in the above decree, and is made upon the evidence before the Commission and the court in the former case and also upon additional evidence taken in the present proceeding.

The complainant in the pending case, the Chamber of Commerce of Chattanooga, is the successor of the Board of Trade of Chattanooga, complainant in the former case, and is an association of merchants and business men of Chattanooga incorporated under the laws of Tennessee for the purpose "of promoting and fostering the commercial, manufacturing and other material interests of that city."

The complaint relates to the rates of the defendants on the six numbered classes of traffic and on a large number of commodities from Boston, Providence, New York, Philadelphia, and Baltimore to Chattanooga and Nashville, respectively, both by the direct lines to Chattanooga and via Chattanooga to Nashville, and by the lines via Cincinnati to Chattanooga and via Cincinnati to Nashville, and it charges:

First, That the rates to Chattanooga are unjust and unreasonable in themselves, in violation of section 1 of the Act to regulate commerce, which requires all rate charges for any service rendered in the transportation of property or in connection therewith to be reasonable and just and prohibits and declares unlawful every unjust and unreasonable charge.

Second, That the rates to Chattanooga are higher than for the longer haul through Chattanooga and 151 miles on to Nashville, and are in violation of the provision of section 4 of the Act to regulate commerce which declares it to be unlawful for any common carrier subject to the provisions of the Act "to charge or receive any greater compensation in the aggregate for the transportation of a like kind of property under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance."

Third, That "the merchants and other business men of Chattanooga and Nashville, respectively, compete for business largely in the same territory; that the excesses of the Chattanooga rates over the Nashville rates amount in most, if not all, instances to a reasonable profit on the traffic and subject Chattanooga merchants to an undue or unreasonable prejudice or disadvantage in such competition and give Nashville an undue or unreasonable preference or advantage over Chattanooga in such

10 I. C. C. REP.—8.

competition, and that the rates in question to Chattanooga and Nashville are, therefore, in violation of section 3 of the Act to regulate commerce, which declares unlawful such undue or unreasonable prejudice or disadvantage and such undue preference or advantage."

It is alleged in the complaint that if there should be any difference in rates as between Chattanooga and Nashville, such difference should be made by making the Chattanooga rates lower than the Nashville rates, because, (1) of Chattanooga's greater proximity to the points of shipment, Boston, Providence, New York, Philadelphia and Baltimore; (2) of transportation by the Tennessee River to Chattanooga; and (3) of the greater number of rail lines which enter Chattanooga and compete for business from those cities to Chattanooga than enter Nashville and compete for such business to Nashville.

The complaint sets forth the rates in question to Chattanooga and to Nashville on the six numbered classes, and also on a large number of commodities.

All the defendants, except the Merchants & Miners Transportation Company and the Clyde Steamship Company, have filed answers to the complaint.

In these answers (except that of the New York, New Haven & Hartford Railroad Company) the defendants admit that the rates in question are higher for the shorter haul to Chattanooga than for the longer haul by 151 miles through Chattanooga to Nashville; that the rates are correctly set forth in the complaint and that they participate in those rates either as members of the lines to Chattanooga and through Chattanooga to Nashville, or as members of the lines through Cincinnati to Chattanooga and to Nashville, but they deny that those rates are in violation of either section 1, 3 or 4 of the law as charged in the complaint.

In justification of the lower rates from New York and other eastern seaboard cities to Nashville than to Chattanooga, it is alleged (answers of the Louisville & Nashville Railroad Company and Nashville, Chattanooga & St. Louis Railway Company) that those rates were primarily made by the Trunk Line roads through the Ohio River crossings, Cincinnati, Louisville

and Evansville, "and are controlled by the following competitive circumstances and conditions:"

First, Water competition by the Hudson River, the St. Lawrence River, the Erie Canal and the lakes, which fixes the rail rates from New York to Chicago and to which latter rates, it is alleged, the rates from New York and other eastern seaboard cities to Cincinnati, Louisville and Evansville "are made to bear certain fixed relations."

Second, Water competition between Paducah and Evansville on the Ohio River, on the one hand, and Nashville on the Cumberland River, on the other, by means of boats on the Cumberland River which connect with boats on the Ohio River.

Third, Water competition from New York and the other eastern seaboard cities to Cincinnati, Louisville and Evansville by way of the ocean, the gulf and the Mississippi and Ohio rivers.

Fourth, Competition by ocean from New York and other eastern seaboard cities to Norfolk and Newport News, Virginia, and thence by the rail lines, the Norfolk & Western and the Chesapeake & Ohio railways, from those cities to Louisville, Cincinnati and Evansville.

It is alleged that the rates from said eastern seaboard cities to Cincinnati and Louisville having been fixed by these competitive circumstances and conditions, the rates from said eastern seaboard cities to Nashville cannot greatly exceed the rates to Cincinnati or Louisville added to the rates which can be obtained by steamboats from Cincinnati or Louisville over the Ohio and Cumberland rivers to Nashville, but that there is no effective open water route from the eastern seaboard cities to Chattanooga, nor from Cincinnati or Louisville to Chattanooga and the water competition which forces down the through rail rates from Cincinnati and Louisville, respectively, to Nashville, does not extend to Chattanooga.

It is further alleged that Nashville enjoys a position geographically which is not enjoyed by Chattanooga, being practically the center of a circle, of which Cincinnati, Louisville, Evansville, Cairo and Memphis may be regarded as points on the circumference, and that there is a large territory tributary to Cincinnati, Louisville, Evansville, Cairo and Memphis, south

10 I. C. C. REP.

of the Ohio River, which is also tributary to Nashville, and the rate adjustment to Nashville relatively to the points specified above has been, is, and should be such as to enable it to do business in comparison with those cities.

The Southern Railway Company alleges in its answer that all rates from eastern seaboard cities to Chattanooga are fixed by the eastern lines and are made relative to the rates from those cities to Atlanta, Rome, Birmingham and Anniston, which cities compete directly with Chattanooga in territory common to those cities and to Chattanooga, and that this is the basis upon which the Chattanooga rates are made.

The Louisville & Nashville road denies that it is engaged in the transportation of traffic *through Chattanooga* to Nashville.

The New York, New Haven & Hartford Railroad Company denies that it is a party to any of the rates in question in this case and the testimony is silent on that point.

It is also alleged in behalf of the defendants that the Chattanooga and Nashville rates are governed by different classifications; the Chattanooga rates by the Southern Classification and the Nashville rates by the Official Classification.

FACTS.

1. The defendants, the Southern Railway Company, the Louisville & Nashville Railroad Company, the Nashville, Chattanooga & St. Louis Railway Company, the Cincinnati, New Orleans & Texas Pacific Railway Company, the Chesapeake & Ohio Railway Company, the Georgia Railroad, the Central of Georgia Railway Company, the Norfolk & Western Railway Company, the Baltimore & Ohio Railroad Company, the Pennsylvania Railroad Company, the Merchants & Miners Transportation Company, the Clyde Steamship Company and the Ocean Steamship Company of Savannah, are common carriers engaged as parts of through lines and under joint tariffs of rates in transporting traffic from New York and other eastern seaboard cities to Chattanooga and to Nashville.

2. The following table gives the rates in question from Boston, Providence and New York to Chattanooga and Nashville, respectively, on the six numbered classes in cents per

10 I. C. C. RFP.

hundred pounds, and also shows the excesses in cents per hundred pounds and per carloads of 30,000 pounds of the Chattanooga rates over the Nashville rates.

	1	2	3	4	5	6
Chattanooga	114	98	86	73	60	49
Nashville	91	78	60	42	36	31
Excess per 100 lbs. of Chattanooga rates	23	20	26	31	24	18
Excess per carload of 30,000 lbs.....	\$69	\$60	\$78	\$93	\$72	\$54

The same excesses of the rates to Chattanooga over those to Nashville as are shown in the above table in rates from Boston, Providence and New York, exist under the rates from Philadelphia and Baltimore.

The following table gives the rates in cents per hundred pounds from Boston, Providence and New York to Chattanooga and Nashville, respectively, and the excesses of the Chattanooga rates over the Nashville rates on carloads of 30,000 pounds on a few commodities. Those rates are given as illustrating the differences in rates in favor of Nashville on the entire list of commodities.

COMMODITY RATES.

Canned goods Boston and New York to Chattanooga, C/L.....	\$ 0 48
Canned goods Boston and New York to Nashville.....	36
Difference on a carload of 30,000 pounds in favor of Nashville....	36 00
Green coffee Boston and New York to Chattanooga, C/L.....	60
Green coffee Boston and New York to Nashville.....	36
Difference on a carload of 30,000 pounds in favor of Nashville....	72 00
Roasted coffee Boston and New York to Chattanooga, C/L.....	60
Roasted coffee Boston and New York to Nashville	36
Difference on a carload of 30,000 pounds in favor of Nashville....	72 00
Agate-ware Boston and New York to Chattanooga, C/L.....	73
Agate-ware Boston and New York to Nashville.....	42
Difference on a carload of 30,000 pounds in favor of Nashville....	93 00
Baking powder Boston and New York to Chattanooga, C/L.....	73
Baking powder Boston and New York to Nashville.....	42
Difference on a carload of 30,000 pounds in favor of Nashville....	93 00
Beans Boston and New York to Chattanooga, C/L.....	60
Beans Boston and New York to Nashville.....	36
Difference on a carload of 30,000 pounds in favor of Nashville....	72 00
Earthen-ware Boston and New York to Chattanooga, C/L.....	60

Earthen-ware Boston and New York to Nashville.....	36
Difference on a carload of 30,000 pounds in favor of Nashville....	72 00
Hollow-ware Boston and New York to Chattanooga C. L.....	60
Hollow-ware Boston and New York to Nashville.....	36
Difference on a carload of 30,000 pounds in favor of Nashville....	72 00
Cartridges Boston and New York to Chattanooga, C/L.....	60
Cartridges Boston and New York to Nashville.....	42
Difference on a carload of 30,000 pounds in favor of Nashville....	54 00
School slates Boston and New York to Chattanooga, C/L.....	60
School slates Boston and New York to Nashville.....	36
Difference on a carload of 30,000 pounds in favor of Nashville....	72 00

The same differences in rates in favor of Nashville as are shown in the above table in rates from Boston, Providence and New York, exist under the rates from Philadelphia and Baltimore.

The rates by all the lines to Chattanooga are the same and the rates by all the lines to Nashville are the same.

3. Chattanooga class rates are governed by the Southern Classification, and Nashville class rates by the Official. A large number of articles are in the same class in both classifications; there are some articles which are classed higher under the Official Classification than under the Southern, and some that are classed higher under the Southern Classification than under the Official; but even where articles are classed higher under the Official Classification than under the Southern, they still have lower rates under the Official Classification than under the Southern, because the Southern Classification rates are so much higher per class than the Official Classification rates. For example, the class 6 rate of the Southern Classification is higher than the class 4 rate of the Official Classification.

4. By the lines from New York and other eastern seaboard cities through Chattanooga, Huntsville is a longer distance point than Chattanooga by 97 miles, Decatur by 122 miles, Tusculumbia by 165 miles, Sheffield by 170 miles, and Florence by 173 miles, but the rates to all these points are the same as the rates for the shorter haul to Chattanooga. The testimony shows that these rates as applied to the longer hauls to these longer-distance points yield the carriers a remuneration in excess of operating expenses and fixed charges.

The rates for the haul from eastern seaboard cities through

Chattanooga and 310 miles on to Memphis are lower than for the shorter haul to Chattanooga. For example, the class 1 rate from New York to Memphis is 100 cents as against a rate of 114 cents to Chattanooga. The testimony is that if this rate of 100 cents were applied to the shorter haul to Chattanooga "it would not be unremunerative." The Memphis rail rates are made with a view of meeting competition by the Mississippi River on which Memphis is located.

The rates from eastern seaboard cities by ocean to Norfolk and thence by rail to Evansville are lower than the rates to Chattanooga. For example, the class 1 rate by that route to Evansville is 73 cents per hundred pounds. The class 1 rate by that route to Chattanooga is \$1.14, 41 cents higher than the Evansville rate. The testimony tends to show that the 73-cent rate as applied to the haul to Evansville is reasonably remunerative, and it is testified that the same rate as applied to the haul to Chattanooga "would yield more than the cost of transportation to Chattanooga."

5. The Chattanooga rates from eastern seaboard cities yield rates per ton per mile much greater than—in some instances more than double—the average receipts per ton per mile of the principal defendants, of roads throughout southern territory and of roads throughout the United States.

6. The rates in question from New York and other eastern seaboard cities to Chattanooga were established by the roads as members of the Southern Railway & Steamship Association, and are still with immaterial exceptions maintained as originally fixed. The Southern Railway & Steamship Association ceased to exist under that name in about 1895, but it was succeeded by the Southern States Freight Association, which in turn was succeeded, May 1, 1897, by the Southeastern Freight Association. The existing association names rates and fixes classifications through joint committees, each road having a representative on the committee, and the rates are, as a rule, concurred in and maintained as under the Southern Railway & Steamship Association, although the succeeding association has not the power, which the Southern Railway & Steamship Association had, of enforcing the maintenance of rates by fines. The

10 I. C. C. REP.

roads not belonging to the association conform to the association rates. The Chattanooga rates as now fixed have been in force more than 18 years and were established long before the Southern Railway & Steamship Association was dissolved.

7. In establishing rates from eastern seaboard cities to Chattanooga, the Southern Railway & Steamship Association grouped Chattanooga with the following cities and towns and perhaps others, to wit: Dalton, Rome, Atlanta, Americus, Athens, Columbus, Fort Gaines and Griffin, in the State of Georgia; Huntsville, Decatur, Sheffield, Tuscumbia, Florence, Gadsden, Oxford, Talladega, Anniston, Birmingham, Opelika, Montgomery, Selma and Eufaula, in the State of Alabama and Meridian, in the State of Mississippi. The sea-and-rail rates to all these points are the same as to Chattanooga, although many of them are longer-distance points from the east than Chattanooga and the haul to them is through Chattanooga, for example, Huntsville, Decatur, Florence, Tuscumbia and Sheffield. The sea-and-rail rates are the rates by ocean to Norfolk, Pinner's Point, Charleston or Savannah and thence by rail, and are the rates complained of in this case. The bulk of the traffic to Chattanooga and the Chattanooga group comes by these sea-and-rail lines and these sea-and-rail rates are applied to that traffic. Of the cities and towns named above as belonging to the Chattanooga group, Dalton, Rome, Atlanta, Americus, Athens, Columbus, Griffin, Anniston, Gadsden, Oxford, Opelika and Eufaula have higher all-rail class rates than Chattanooga—their all-rail rates on the six numbered classes being as follows:

1	2	3	4	5	6
126	108	95	81	66	54

The all-rail rates to the other points in the group are the same as to Chattanooga.

It is claimed and the testimony is to the effect that a reduction in the rates to Chattanooga would necessitate a reduction in the rates to all the points in the same group with Chattanooga, as without such reduction, Chattanooga would be given an unjust advantage in rates over those points.

8. Nashville is situated on the Cumberland River and is

reached by the Louisville & Nashville road, the Nashville, Chattanooga & St. Louis Railway and the Tennessee Central Railroad.

Chattanooga is located on the Tennessee River and is reached by the following nine originally independent railroads, to wit: The Cincinnati Southern Railway; the Southern Railway; the Georgia Division of the Southern Railway; the Western & Atlantic Railroad; the Chattanooga, Rome & Southern Railroad; the Chattanooga Southern; the Alabama Great Southern; the Memphis & Charleston Railroad; and the Nashville, Chattanooga & St. Louis Railway.

These nine roads are now operated by about four distinct companies or systems.

9. In the former case the only lines involved were the direct lines, all-rail or sea-and-rail, to Chattanooga and through Chattanooga to Nashville, and the order of the Commission related to rates over those lines alone. The lines involved under the complaint in the present case are the lines from New York and other eastern seaboard cities, either all-rail, or sea-and-rail, via Norfolk, Charleston or Savannah, to Chattanooga and through Chattanooga to Nashville, and also the lines via Cincinnati to Chattanooga and to Nashville.

The short all-rail line from New York via Cincinnati to Nashville is made up of the Pennsylvania Railroad from New York to Cincinnati and the Louisville & Nashville road from Cincinnati to Nashville, and is 1058 miles in length.

The short all-rail line from New York to Chattanooga is by the Pennsylvania Railroad from New York to Alexandria, the Southern Railway from Alexandria to Lynchburg, the Norfolk & Western Railway from Lynchburg to Bristol and the Southern Railway from Bristol to Chattanooga, and is 846 miles in length.

The excess of the distance by the above line via Cincinnati to Nashville over the above line to Chattanooga is 212 miles.

The short all-rail line from New York via Chattanooga to Nashville is by the line above given to Chattanooga and thence over the Nashville, Chattanooga & St. Louis Railway 151 miles on to Nashville. By this line and by all lines through Chat-
10 I. C. C. REP.

tanooga to Nashville, Nashville is the longer distance point by 151 miles.

The Tennessee Central Railroad is a new road opened for business May 27, 1902, the date of the taking of the testimony in this case before the Commission. Its main line is 165 miles in length and extends from Nashville to Emory Gap and to Harriman, points about 2 miles apart, the former on the Cincinnati, New Orleans & Texas Pacific Railway and the latter on that road and also on the Southern Railway. The Southern Railway has a line about 50 miles in length from Harriman to Knoxville. By this line formed by the Tennessee Central and the Southern Railway via Harriman from Nashville to Knoxville, the distance is said to be about 50 miles less than by the line via Chattanooga to Knoxville.

At the time named above of the taking of the testimony in this case, the Tennessee Central road had traffic arrangements and published tariffs of rates from Cincinnati and Louisville, but not from eastern seaboard cities, to Nashville. The road is now a party to a joint tariff issued by the Asheville line (Southern Railway), Seaboard Air Line, Piedmont Air Line and Atlantic Coast Line, filed with this Commission as effective May 12, 1903, the rates under which to Nashville are the same as those involved in this case by the other lines. Whether any traffic from the east comes over the Tennessee Central road as the terminal carrier to Nashville does not appear.

There are a number of other lines that can be formed from eastern seaboard cities to both Nashville and Chattanooga, for example, the rail lines and the rail and Cumberland River lines via Louisville or Evansville to Nashville and the rail line and Tennessee River line via Paducah to Chattanooga.

10. The Louisville & Nashville Railroad Company owns and operates the road from Evansville to Nashville and the road from Cincinnati through Louisville to Nashville, and is part of the short through line from New York and other eastern seaboard cities via Cincinnati to Nashville. It also operates jointly with the Atlantic Coast Line Railroad the road from Augusta to Atlanta, Georgia, and it owns a majority of the capital stock of the Nashville, Chattanooga & St. Louis Railway

Company, which latter road, having leased the Western & Atlantic extending from Atlanta to Chattanooga, operates the line all the way from Atlanta through Chattanooga to Nashville.

The Louisville & Nashville road by virtue of its ownership of a majority of the stock of the Nashville, Chattanooga & St. Louis Railway, can name the entire board of directors and has the power to control the operations of the latter road. If competition of the Nashville, Chattanooga & St. Louis Railway Company with the Louisville & Nashville Railroad Company on traffic from the east to Nashville should for any reason become objectionable to the Louisville & Nashville road, it possesses the power to control or put an end to that competition.

The two roads, however, have separate and distinct corps of officers and employees and appear to be in active competition for traffic from eastern seaboard cities to Nashville. The Louisville & Nashville road has no interest, as stockholder or otherwise, in any railroad east of Augusta or in any ocean steamship company whose vessels ply from South Atlantic ports to New York and other eastern seaboard cities.

The competition of the Nashville, Chattanooga & St. Louis Railway, as a member of the lines through Chattanooga to Nashville, with the Louisville & Nashville Railroad, as a member of the lines through Cincinnati to Nashville, for traffic from eastern seaboard cities to Nashville does not affect the rates to Nashville. The rates of the lines through Chattanooga and through Cincinnati are the same and have been the same as now for a long period of time. There is active competition between the two sets of lines for business, but *that competition is at the "established rates."* There has been no competition *affecting rates* since the rates were established by the Southern Railway & Steamship Association more than 18 years ago.

The Louisville & Nashville Railroad Company was not made a party defendant in the former case *before the Commission*, and was not embraced in the order in that case, but it is a party defendant in the present case. After suit had been instituted in court to enforce the order in the former case, the Louisville & Nashville Railroad Company, not having been made a party defendant to that suit, came in voluntarily and filed an answer

10 I. C. C. REP.

jointly with the Central Railroad & Banking Company of Georgia and was subsequently made a party to that suit by order of the court. In its answer it alleged its joint operation of the line from Augusta to Atlanta and its ownership of a majority of the capital stock of the Nashville, Chattanooga & St. Louis Railway, and in paragraph 9 of that answer admitted its participation jointly with its co-respondent, the Central Railroad & Banking Company of Georgia, in the rates from eastern seaboard cities to Chattanooga and to Nashville. The Louisville & Nashville road, therefore, being also a member of the lines via Cincinnati to Nashville, participates both in the rates of those lines and in the rates of the lines through Chattanooga to Nashville.

11. By steamboats operating on the Cumberland River and connecting with Ohio and Mississippi river boats, Nashville has water communication with Cincinnati, Louisville, Evansville, Brookport or Paducah, and Cairo.

The Cumberland River is navigable from 7½ to 10 months in the year, an average of about 8½ months. On shipments by the Ohio and Cumberland rivers from Cincinnati to Nashville, the traffic is transferred from the Ohio River boat to the Cumberland River boat at Evansville or Paducah.

The distance from Cincinnati to Nashville by the Ohio and Cumberland rivers is 690 miles and by all-rail (the Louisville & Nashville road) 295 miles. From Evansville to Nashville by river the distance is 340 miles and by rail 154 miles. The time by boat from Cincinnati to Nashville is 6 days, and for the round trip 12 days. The time from Evansville to Nashville is 2½ days and for the round trip about 6 days.

There is no material amount of traffic from New York and other eastern seaboard cities which moves to Nashville by boat on the Cumberland River. There are no through rates published or agreed upon from eastern seaboard cities by rail to Cincinnati or Evansville and thence by river to Nashville, and there never have been such through rates. The boat lines from Cincinnati and from Evansville to Nashville have no published rates. The largest business done by boats on the Cumberland River from Ohio River points to Nashville is the grain business.

10 I. C. C. REP.

The bulk of the traffic besides grain transported on the Cumberland River from Evansville to Nashville consists of buckets, brooms, sieves, woodenware, molasses and glucose.

The rail lines have great advantages over the river lines and merchants much prefer the former. It is only when the rail rates are excessive or unreasonable that they resort to the river. And the goods and commodities shipped by Nashville merchants by river to Nashville are for the most part, if not entirely, traffic as to which time is not an element of importance. The risk by river is greater than by rail and river traffic from Cincinnati to Nashville is insured.

Since the advent of railways, the business of river lines on long through hauls has almost entirely ceased and, although the rail rates from Cincinnati, Louisville and Evansville to Nashville are much higher than the river rates, the railroads get all but an inconsiderable portion of the business.

Nashville merchants testify that they have the Cumberland River to rely upon for protection from excessive rates by rail and that a material increase in the present rail rates would force them to resort to a large extent to the river line.

Before the rail lines were completed to Nashville, traffic came from eastern seaboard cities by the Pennsylvania Railroad to Pittsburg and thence by the Ohio and Cumberland rivers to Nashville, but there were no through rates and no through billing.

The Nashville, Chattanooga & St. Louis road, connecting Chattanooga with Nashville, was completed in 1854, five years before the completion of the Louisville & Nashville road to Nashville. The construction of the former road commenced at Nashville and extended east to Chattanooga. After it had been completed as far east as Stevenson, a point 38 miles from Chattanooga, rates were made from New York for the transportation of traffic via Charleston to Chattanooga, thence by the Tennessee River to Caperton's Landing, thence 4 miles by wagon to Stevenson and thence by rail to Nashville. The first through rates from the east to Nashville were made over this line through Chattanooga.

The testimony is that when the Nashville, Chattanooga & St.
10 I. C. C. REP.

Louis road was completed from Nashville to Chattanooga the competition it met on traffic from the east to Nashville was that of the Cumberland River, and that when the Louisville & Nashville road was subsequently completed from Cincinnati to Nashville the Cumberland River competition was "transferred" to that road, and the Nashville, Chattanooga & St. Louis road had to meet the rates of that road thus influenced by Cumberland River competition.

The Cumberland River is stated by defendants' witnesses to be and to have been the controlling competitive force, or in the language of a witness, the "common enemy," which the rail lines from the east to Nashville have to meet; and that because of this competition by the Cumberland River the Nashville rates even before the completion of the roads to Nashville were lower than the Chattanooga rates. It is to be noted that at that time and until a comparatively recent period, the Tennessee River was not, as it now is by the completion of the canal through the Mussel Shoals referred to in the next subdivision of this report and opinion, opened up for continuous transportation from Chattanooga to the Ohio River.

Nevertheless, upon all the evidence in this case and our general knowledge of the situation, we are convinced and find that the rates accepted for the transportation of eastern merchandise to Nashville are not forced upon the carriers by water competition for that traffic. The competition which the lines *via Chattanooga* meet is distinctly the competition of the trunk lines and the Louisville & Nashville road whose northern termini are at points on the Ohio river; it results from the fact that the trunk line basis of rates was long ago extended to Nashville. In this connection we repeat the finding in the former case, as follows:

"The river rates are now considerably lower than the rail rates, and more or less of the local traffic goes by water; but the through business from Atlantic cities, saving the time, distance and cost of breaking bulk at Cincinnati, would continue to go by rail, in our judgment, even if the disparity between land and water rates were materially greater than it is now. There might, of course, be such

10 I. C. C. REP.

an advance in rail rates that shipments from the east would take the water route from Cincinnati. What amount of difference would produce that result it is impossible to determine from the testimony; but we find that such difference might be substantially greater than it is at present without important effect upon the railroad tonnage from the east, and that the through rate to Nashville is in no sense controlled by water competition at that point, either actually encountered or seriously apprehended."

12. By means of boats on the Tennessee River, Chattanooga now has continuous water transportation from Chattanooga to Paducah at the confluence of the Tennessee and Ohio rivers and to Ohio and Mississippi river points, St. Louis, Cairo, Evansville, Louisville and Cincinnati. The Tennessee River is navigable from Chattanooga to the Ohio River from 8 to 10 months during the year, an average of 9 months. The distance by the Tennessee River from Paducah to Chattanooga is 464 miles and it takes from 3 to 4 days for a boat to go from Paducah to Chattanooga.

When the complaint in the former case before the Commission was filed, continuous transportation by the Tennessee River from Chattanooga to Paducah and the Ohio River was interrupted by the Mussel Shoals. A canal was then being built by the government through the shoals and it was opened in November, 1890. Since that time it has been maintained "in a state of efficiency and readiness for use throughout the entire year, and there has been a steady annual increase in the number of vessels passing through the canal." (Annual Report upon Improvements of Tennessee River by the United States Chief of Engineers for the year 1901, p. 466.)

The boats on the Tennessee River running from Chattanooga to Florence and Paducah have increased from 16 in 1890 to 54 in 1899, and the tonnage of traffic has increased from 78,820 tons in 1892 to 253,340 tons in 1899.

The bulk of the traffic from New York and other eastern seaboard cities to Chattanooga is shipped by ocean to Norfolk and thence by rail to Chattanooga, but shipment from those cities to Cincinnati or Paducah and thence by river to Chat-

10 I. C. C. REP.

tanooga is practicable. Such shipments are made but not to any material extent in consequence of the great advantage of the direct all-rail or rail-and-ocean lines via Norfolk to Chattanooga.

A large proportion of the business of boats on the Tennessee River originates in Chicago, St. Louis and Louisville and there is a considerable tonnage of traffic from Cincinnati and Evansville. Traffic from Cincinnati, Louisville and Evansville is transferred at Paducah.

In order to protect themselves from excessive rates by rail and to meet the discrimination in rates against Chattanooga and in favor of Nashville, the Chattanooga merchants have established a boat line on the Tennessee River operating between Chattanooga and Paducah and points on the Ohio River. The steamer Avalon of this line has a tonnage of 305 tons and from February 6 to July 4, 1901, it made 15 round trips through the Mussel Shoals to Paducah carrying 674 passengers and 3,557 tons of freight. This steamer also goes to Cairo.

The principal traffic transported on the Tennessee River consists of general merchandise, lumber, hay and grain, cotton and cotton seed, flour, peanuts, produce, fertilizers, live stock, logs and wood, railroad ties, staves, stone, sand and gravel.

13. On traffic from New York and other eastern seaboard cities consigned to Chattanooga via Cincinnati, the proportion of the through rates charged by the Trunk Lines up to Cincinnati are the regular rates of those lines on traffic consigned to Cincinnati, but on traffic consigned via Cincinnati to Nashville those proportions vary slightly from the regular rates to Cincinnati.

By comparing the excesses of the Chattanooga rates over the Nashville rates with the excesses of the proportions charged by the Cincinnati, New Orleans & Texas Pacific road from Cincinnati to Chattanooga over the proportions of the Louisville & Nashville road from Cincinnati to Nashville, it will be perceived that there is no material difference between them; the former exceeding the latter by a small fraction on class 1, and the latter exceeding the former to a small extent on the remaining classes.

Chattanooga is entitled to the benefit of low Trunk Line rates to Cincinnati and has it to practically the same extent as Nashville. The difference in rates between the two cities begins at Cincinnati and results from the higher rates charged by the Cincinnati, New Orleans & Texas Pacific road from Cincinnati to Chattanooga than are charged by the Louisville & Nashville road from Cincinnati to Nashville.

If the proportions of the Cincinnati, New Orleans & Texas Pacific road from Cincinnati to Chattanooga were reduced so as to make them not higher than the proportions of the Louisville & Nashville road from Cincinnati to Nashville, the Chattanooga rates would be about as high as, or not materially different from, the Nashville rates from the eastern seaboard cities. The distance by the Cincinnati, New Orleans & Texas Pacific road from Cincinnati to Chattanooga exceeds the distance by the Louisville & Nashville road from Cincinnati to Nashville by about 37 miles. It is testified that this "slight difference" in distance is immaterial and had nothing to do with fixing the rates.

Some traffic from the east comes to Chattanooga via Cincinnati, but the most of it comes, as before stated, via the Virginia ports, Norfolk and Newport News, and the direct short rail lines to Chattanooga.

There is no evidence that any traffic from the east comes to Chattanooga via Cincinnati and Nashville or via Evansville and Nashville.

14. Trunk Line territory *proper* lies east of the Mississippi and north of the Ohio and Potomac rivers and Southern territory is that east of the Mississippi and south of those rivers. Nashville, as well as Chattanooga, is in Southern territory, but Nashville is not as far removed from Trunk Line territory as Chattanooga. Nashville by the Louisville & Nashville road is 155 miles from Trunk Line territory at Evansville, 185 miles at Louisville and 301 miles at Cincinnati. Chattanooga by the Cincinnati, New Orleans & Texas Pacific Railway is 338 miles from Trunk Line territory at Cincinnati and by the Louisville & Nashville road via Nashville is 306 miles at Evansville.

Because of the greater density of population and greater
101. C. C. REP.—9.

volume of traffic in Trunk Line territory than in Southern territory, the rates charged by the Trunk Line roads can be and are made lower than in Southern territory.

The transportation by the Louisville & Nashville road of eastern traffic from Cincinnati to Nashville is through Southern territory, but the rates charged by that road for the portion of the through haul from Cincinnati to Nashville are practically extensions of Trunk Line rates, the rate per ton per mile under those rates being about the same as the rate per ton per mile under the Trunk Line rates from the east to Cincinnati. In Paragraph VIII of the answer of the Louisville & Nashville Railroad Company filed in this case, it is alleged that "the through rates from Boston and New York to Nashville *were fixed by the Trunk Lines* a number of years ago and are practically the same as the rates in force to points taking 120 per cent of the New York-Chicago rate." Henderson, Owensboro, and Paducah, Ky., and Cairo, Ill., are named in Paragraph V of the answer as points, besides Nashville, taking 120 per cent of the New York-Chicago rate. Whether the Nashville rates via Cincinnati were fixed by the Trunk Lines or not, the material fact is, as above stated, that the rates from Cincinnati to Nashville over the Louisville & Nashville road are practically extensions to Nashville of the Trunk Line rates. The through rates from New York and other eastern cities via Cincinnati to Nashville are, in the language of the witnesses, "*pro-rated* all the way to Nashville," while the through rates via Cincinnati to Chattanooga are not pro-rated.

15. Nashville competes with Cincinnati, Louisville, Evansville, Paducah, Cairo and Memphis, in territory between Nashville and those cities. Cincinnati, Louisville and Evansville are shorter distance points than Nashville from eastern seaboard cities by the direct rail or rail-and-water lines and their rates are lower than the Nashville rates.

Any material advance in the Nashville rates would injure Nashville in that competition and would also increase the river business on the Cumberland River.

16. Nashville also competes with Chattanooga in territory between Nashville and Chattanooga on the line of the Nashville,

Chattanooga & St. Louis Railway and in territory south and west of Chattanooga in Tennessee, Georgia and Alabama on the Memphis & Charleston, Alabama Great Southern, Western & Atlantic and other roads.

On the line of the Nashville, Chattanooga & St. Louis Railway between Nashville and Chattanooga, Nashville has the advantage in rates over Chattanooga. The combinations of the through rates on class 1 goods from New York, for example, to Chattanooga with the local rates from Chattanooga to stations on the Nashville, Chattanooga & St. Louis Railway between Chattanooga and Nashville, exceed to a material extent the combinations of the through rates to Nashville with the local rates from Nashville to those stations, and Chattanooga merchants testify that they cannot sell goods shipped from the east on terms of equality in competition with Nashville merchants in territory west of a point 30 miles from Chattanooga and 121 miles from Nashville on the Nashville, Chattanooga & St. Louis Railway and that they are forced to sell at a much less profit in that territory, if they sell at all, than Nashville merchants realize.

The Nashville merchants also have a material advantage in rates over Chattanooga merchants in territory west of Chattanooga on the Memphis & Charleston (now Southern) road and at a number of points on the roads south of Chattanooga in Georgia and Alabama much nearer to Chattanooga than to Nashville.

The testimony of a large number of Chattanooga merchants was taken, and it shows that the growth of Chattanooga and her mercantile business, particularly "jobbing business," have been greatly retarded by the materially higher rates from the east to Chattanooga than to Nashville.

At the time when the lower rates from the east to Nashville than to Chattanooga were established, Chattanooga was a small town with only one partially wholesale house, while Nashville had 12 or 13 wholesale houses. Nashville was then recognized as the distributing point for the section of country up to, if not including, Chattanooga. The situation in this respect has changed. It is conceded that Chattanooga is now entitled to

10 I. C. C. REP.

recognition and treatment as a distributing center, that her "shipping facilities are superior to those of either Nashville or Knoxville" and that "taking into account the claims of those cities, the *legitimate* trade of Chattanooga covers a strip of territory extending northeast and southwest a distance of about 200 miles in length by about 125 miles in width."

At the same time, we are constrained to find, as a deduction from the foregoing and other facts appearing in the record, that the circumstances and conditions under which this eastern traffic is carried to Nashville are not substantially similar to the circumstances and conditions under which the same traffic is carried to Chattanooga. The lower rates to Nashville via the Ohio river gateways are not made or controlled by the lines operating via Chattanooga, and the latter are under compulsion to meet those rates or forego participation in the traffic from the eastern seaboard to Nashville.

CONCLUSIONS.

The facts appearing in the present case are not materially different from those disclosed in the former proceeding. While minor changes have taken place since the prior investigation, the salient features of the situation remain practically unaltered. It is clear now as it was then that the lower rates from eastern seaboard cities to Nashville than to Chattanooga give Nashville merchants, on traffic from those cities, an advantage over Chattanooga merchants in territory which may be said to be naturally tributary to Chattanooga; it is equally clear that this disparity in charges has its origin and alleged justification in differences of circumstances and conditions which have existed in substantially the same form for many years. In its practical aspects the problem has not been simplified by lapse of time, while the law from which the Commission derives its authority has meanwhile received repeated and binding construction. The theory upon which our former ruling was based has been declared unsound, and it is obviously our duty to test the facts presented in this case by the law as it has been interpreted for our guidance. If these facts do not show a violation of the regulating statute, as that statute has been construed, we should

so decide, whatever appears to be the injustice suffered by Chattanooga, since the making of an order which would not be enforced by the courts would be useless and unwarranted.

In the light of various decisions of the Supreme Court, and as stated in the foregoing findings, we cannot seriously doubt that the traffic in question is carried to Nashville and Chattanooga, respectively, under substantially different circumstances and conditions. This being so, the action of the carriers in maintaining a higher rate for the shorter haul to Chattanooga cannot be regarded as unlawful under the fourth section of the act, or otherwise condemned merely because a lower rate is granted to Nashville. This question is now so well settled as not to be open to discussion.

We have no authority, even if we had the disposition, to require an advance of the Nashville rates. Those rates are the product of influences which have long been in potent operation. They are rates to which many and important commercial interests are adjusted and on which those interests are largely dependent. The testimony shows that Nashville had lower rates from the east than Chattanooga before the railroads were constructed between Cincinnati and Nashville and between Chattanooga and Nashville, and these lower rates to Nashville have ever since been in force. Their origin and continuance are attributed to the fact that Nashville is much nearer to Trunk Line territory than is Chattanooga, and to the fact of water competition by the Ohio and Cumberland rivers. Before the rail lines were extended to Nashville, traffic from eastern seaboard cities came by the Pennsylvania Railroad to Pittsburg and thence by the Ohio and Cumberland rivers to Nashville. When the Nashville, Chattanooga & St. Louis road was opened between Chattanooga and Nashville, which was prior to the completion of the Louisville & Nashville road from Cincinnati and Evansville to Nashville, the competition it met on traffic from the east to Nashville was that via the Cumberland and Ohio rivers; and when the Louisville & Nashville road was subsequently constructed from Cincinnati to Nashville, the evidence shows that the competition of the Cumberland and Ohio rivers was "transferred" to that road, and that the Nashville, Chattanooga & St.

10 I. C. C. REP.

Louis road had then to meet the rates of the Louisville & Nashville road thus influenced by Cumberland and Ohio river competition.

It is virtually undisputed that Nashville rates from the east are the result of this competition, coupled with the interest of the Louisville & Nashville road to maintain the commercial importance of Nashville. The competition at Chattanooga, whether of carriers or commercial forces, has not been equally effective, as is evidenced by the fact that it has not reduced Chattanooga rates to the level of Nashville rates. In deciding the former case the Supreme Court said (*East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U. S. 19, 45 L. ed. 726, 21 Sup. Ct. Rep. 516):

"Competition which is real and substantial and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstances and conditions prescribed by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive point, and *this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point and the greater rate to the non-competitive point may apparently engender a discrimination against it.*"

The principle or rule here laid down would apply, and was evidently intended to apply, to a case where both points are competitive, but where competition has resulted in lower rates to the longer than to the shorter distance point.

It is further shown that Nashville competes with Cincinnati, Louisville, Evansville, Cairo and other Ohio river points in territory north and west of Nashville; that rates from the east to those Ohio river points are lower than to Nashville; that the present Nashville rates are necessary to enable Nashville to engage in this competition and were fixed, partly at least, with reference to that fact; that even under these rates Nashville is at a disadvantage in the greater part of that territory; and that, therefore, an increase of Nashville rates would place Nashville at quite as great a disadvantage in comparison with Ohio river

points as Chattanooga is now under in comparison with Nashville. In a word, we regard it impracticable to relieve Chattanooga by advancing the Nashville rates.

The whole case, therefore, comes to the question of the reasonableness of the Chattanooga rates. While there is more or less evidence of a persuasive character, standing by itself, that these rates are unreasonably high, such as the fact that they are greater per ton mile than the average of roads in Southern territory and throughout the United States, and are the same as rates for longer hauls through Chattanooga to Sheffield, Tuscumbia, Florence and a few other points in the same territory, with other facts of similar import, the force of this evidence is materially modified, if not overcome, by the kindred fact that Chattanooga rates are no higher than rates to Atlanta, Rome, and a large number of other places with which Chattanooga is grouped.

It is frequently asserted, and with apparent reason, that Atlanta is the most strongly competitive point in the south, and it is situated somewhat nearer the eastern seaboard than Chattanooga. The rates to the Atlanta group are the basis upon which numerous rates are adjusted throughout an extensive area, and these rates are applied to a large volume of traffic. The Atlanta rates are the outgrowth of competition between a number of independent lines, and there is no proof that these rates are unreasonable, except such proof as appears in this case respecting the reasonableness of the same rates to Chattanooga. The fact that rates for the shorter haul to Chattanooga are higher than for the longer haul through Chattanooga to Nashville, or for the longer haul to Evansville, does not warrant the conclusion, under the decisions referred to, that the Chattanooga rates are unreasonable, because the rates to Nashville and Evansville are controlled by competitive forces which do not operate with like effect on rates to Chattanooga.

As above indicated, Chattanooga is "grouped," or classed for rate-making purposes, with Atlanta and some 23 other points in Georgia, Alabama and Mississippi, all of which take the same rates from the east. It is claimed by the defendant carriers, and there is no evidence to the contrary, that a reduction of the rates to Chattanooga would require a reduction in the 10 I. C. C. REP.

rates to Atlanta and all other points taking the same rates; that this in turn would require a corresponding reduction in rates to other localities outside the Atlanta and Chattanooga group; and that, in short, the ultimate and necessary result would be a reduction in rates throughout the entire Southern territory, with a consequent loss of revenue which the roads serving that territory are unable to bear.

Whatever may be said of this contention, and we doubt whether it is well founded to the extent claimed, it seems clear that a reduction of the Chattanooga rates, without a like reduction in rates to Atlanta and the other points with which Chattanooga is grouped, would give Chattanooga an advantage to which that town is not shown to be entitled. In that case Atlanta and other distributing points would be in much the same position with reference to Chattanooga that Chattanooga is now with reference to Nashville. Moreover, so far as we can see, the facts in this case which are claimed to establish the unreasonableness of Chattanooga rates would apply with equal force to rates to Atlanta and other destinations. Nor is it otherwise suggested by complainant. Apparently, therefore, a ruling that Chattanooga rates are unreasonable, and so in violation of the first section of the act, would inferentially and in effect condemn as unlawful the rates to Atlanta and many other points of importance which have long had the same rates as Chattanooga.

Upon the facts now appearing we are not satisfied that such a ruling is warranted. There is much to induce belief that the Chattanooga rates are excessive, though to what extent it would be difficult to determine. It is quite apparent that these rates, to a considerable degree at least, operate to restrict the commercial activities of Chattanooga, particularly in its competition with Nashville; and there is little reason to doubt that the charges now imposed on this eastern traffic to Chattanooga should be materially reduced, if that can be done without injustice to the carriers and localities affected by a readjustment. While this is undoubtedly true, it does not follow that these rates are shown to be unreasonable within the meaning of the first sec-

tion of the act; and this, it should be remembered, is the only question we have authority to decide.

It appears clear to us that the Chattanooga rates cannot be independently considered, even as respects their reasonableness. They are embraced in and connected with a system of equalized rates which have been applied for many years throughout an extensive region, and are closely related to rates in a still larger area comprising the greater part of what is known as southern territory. To deal intelligently with a rate question of such magnitude and complexity seems to require a wider survey than this record permits. Impressed with this view, we feel justified in deferring a final judgment until the situation can be investigated in its larger relations and a more confident basis found than now appears for declaring that this comprehensive system of rates is unlawfully maintained. We do not find or decide that these rates are reasonable; we only say that they are not shown to be otherwise. Upon the facts now presented, and the law as it has been interpreted, we are constrained to hold that no violation of the act has been established.

It follows that the complaint will be dismissed without prejudice to any future investigation.

CLEMENTS, *Commissioner*, dissenting:

I do not agree with the conclusion of the Commission dismissing the complaint in this case because I believe, First, that the rates to Chattanooga are shown to be unreasonable; and, Second, because I believe the adjustment and relation of rates to Chattanooga and Nashville, respectively, are shown to be unduly preferential to Nashville and prejudicial to Chattanooga. The general tenor of the report seems to this effect although relief to Chattanooga is denied, for the reasons therein stated.

It is said in the conclusions of the Commission that "there is much to induce belief that the Chattanooga rates are excessive, though to what extent it would be difficult to determine. It is quite apparent that these rates, to a considerable degree at least, operate to restrict the commercial activities of Chattanooga, particularly in its competition with Nashville; and there is little reason to doubt that the charges now imposed on this eastern

10 I. C. C. REP.

traffic to Chattanooga should be materially reduced, if that can be done without injustice to the carriers and localities affected by a readjustment."

The original complaint of Chattanooga was presented to the Commission in April, 1890. In December, 1892, the Commission, after hearing the case, partially disposed of the same according to its interpretation at that time of the long and short haul clause, requiring the carriers to cease and desist from charging more to Chattanooga than to Nashville, unless upon application, as provided by law, and upon hearing by the Commission, it should be shown that a greater charge for the shorter distance was justified. In the report of the Commission at that time it was said: "We entertain little doubt, therefore, that equity between shipper and carrier requires some reduction in the rates now enforced on Chattanooga traffic from Atlantic points, and are convinced of the necessity for such a reduction to secure relative justice between that town and Nashville. We refrain from further statement of the reasons which have induced this conclusion, as the amount to which the Chattanooga rate should be reduced will not now be decided."

Suit was begun by the Commission to enforce the order made at that time, which, having passed through the various stages of the several courts, was finally determined by the Supreme Court of the United States in 1901 adversely to the ruling of the Commission, which was as stated under the so-called long and short haul provision of the statute, subject to the right of the Commission to further investigate the matter and determine the questions involved according to law.

The present complaint is substantially a continuation of the former one, but was made and has been heard in the light of the interpretation of the law by the Supreme Court in respect to the so-called long and short haul rule, leaving for the determination of the Commission the questions: First, the alleged unreasonableness of the rates to Chattanooga, and, Second, the alleged undue and unreasonable discrimination in the adjustment of the rates to Chattanooga and Nashville, respectively. The ground upon which the Supreme Court overturned the order of the Commission in the former case was that it did not consider

competition between rail carriers to Nashville and competition of markets affecting the rates to that place.

There are three material and important facts shown in this case which were not shown before the Commission in the former case; to-wit, First, that transportation by water is quite as effective to Chattanooga now as to Nashville; Second, that all of the rates in question are the product of the concurrent or joint action of the carriers alleged to be in competition, though in fact not competing, as to the rates; but, on the contrary, establishing the same and maintaining them by a common understanding and co-operation in restraint of competition; Third, that the Louisville & Nashville Railroad Company controls the Nashville, Chattanooga & St. Louis Railway Company and its lines by the ownership of a majority of the stock of the latter company.

It is true that some of these facts were brought out in the case before the Court for the enforcement of the order of the Commission; but the Supreme Court appears to have held that they could not be considered by the Court in upholding a decision by the Commission not based upon these facts but upon an erroneous interpretation of the long and short haul clause whereby material testimony had been excluded from its consideration.

In a pamphlet published jointly by the defendants, the Louisville & Nashville Railroad, the Nashville, Chattanooga & St. Louis Railway and the Southern Railway, entitled "Tennessee," there appears the following:

Chattanooga is the terminus of more leading railway lines and is reached by a larger number of competing systems than any other point in the South. Extending north to Cincinnati, a distance of 338 miles, is the Cincinnati Southern Railway, a part of the Cincinnati, New Orleans & Texas Pacific (Queen & Crescent) System, making connection at Burgen, Ky., for Louisville and the Northwest. Washington, New York, and the New England cities are reached by the Southern Railway, via Knoxville, Asheville, and Salisbury. Atlanta and the Southeastern Atlantic Coast and Gulf cities are reached from Chattanooga by two competing lines, the Western & Atlantic Railroad and the

Georgia Division of the Southern Railway. Due south extends the Chattanooga, Rome & Southern Railroad, a distance of 140 miles to Carrollton, Ga. The Chattanooga Southern, another line extending southward from Chattanooga, has been completed to Gadsden, Ala., a distance of ninety-one miles with fair prospects of being extended farther south at an early date. To the southwest the Alabama Great Southern (Queen & Crescent) reaches Birmingham, Ala., and Meridian, Miss., the latter city being distant 295 miles from Chattanooga, and continuing from Meridian over the same system to New Orleans and Texas points. Due west extends the Memphis & Charleston Railroad to Memphis, 310 miles, and northwest, the Nashville, Chattanooga & St. Louis Railway reaches Nashville and cities of the Northwest and Southwest.

* * * Geographically, Chattanooga is so situated as to eventually become a jobbing market of more than ordinary importance. The numerous lines of railway radiating from Chattanooga like the spokes of a wheel and reaching every section of Tennessee and adjoining states, warrants this statement. Her rivals for the jobbing trade are Nashville, 151 miles to the northwest; Knoxville, 112 miles northeast; and Atlanta, 138 miles south. *Her shipping facilities, however, are superior to those of either of these cities, notably so in the cases of Nashville and Knoxville.* Taking into account the claims of these cities, what might be termed the "legitimate" trade of Chattanooga covers a strip of territory extending northeast and southwest, a distance of about 200 miles in length by 125 miles in width.

These statements do not in my judgment exaggerate the advantageous natural position of Chattanooga. The confederated action of these carriers and others has greatly impaired the vigor of Chattanooga in this field.

The Commission finds that "the Chattanooga rates from eastern seaboard cities yield rates per ton per mile much greater than—in most instances more than double—the average receipts

10 I. C. C. REP.

per ton per mile of the principal defendants, of roads throughout southern territory and of roads throughout the United States." "The rates in question from New York and other eastern seaboard cities to Chattanooga were established by the roads as members of the Southern Railway & Steamship Association, and are still with immaterial exceptions maintained as originally fixed."

The rates per ton per mile on the six numbered classes for the haul of 848 miles (short line distance) from New York to Chattanooga are as follows:

Classes.	
1	2.68 cents.
2	2.31 "
3	2.02 "
4	1.72 "
5	1.41 "
6	1.15 "

The average of the above rates per ton per mile to Chattanooga being 1.88 cents.

The revenue per ton per mile of the principal defendants named below, taken from their annual reports for the years ending June 30, 1900, and 1901, is shown in the following table:

	1900.	1901.
Southern Railway Company .....	.916 cts.	.936 cts.
Louisville & Nashville Railroad Company.....	.752 "	.772 "
Nashville, Chattanooga & St. L. Ry. Company.....	.887 "	.883 "
Cincinnati, N. O. & T. P. Ry. Company.....	.730 "	.745 "
Chesapeake & Ohio Railway Company.....	.343 "	.388 "
Georgia Railroad	1.135 "	1.097 "
Central of Georgia Railroad Company.....	1.096 "	1.064 "
Norfolk & Western Railway Company.....	.430 "	.461 "

RATES PER TON PER MILE FOR THE YEAR ENDING JUNE 30, 1900.

Of roads in West Virginia, Virginia, North Carolina and South Carolina . . . . .	.595 cts.
Of roads in Kentucky, Tennessee, Mississippi, Alabama, Georgia and Florida . . . . .	.808 "
Of roads throughout United States.....	.729 "

10 I. C. C. REP.

Illustrative of the discrimination of the present adjustment of rates against Chattanooga and in favor of Nashville the following table is inserted, showing combination of class 1 through rates from Boston and New York to Chattanooga and Nashville with local class 1 rates from Chattanooga and Nashville to intermediate stations on the Nashville, Chattanooga & St. Louis Railway, and distances from Chattanooga and Nashville to those stations:

To	Distances from Nashville.	Distances from Chattanooga.	Nashville Combination Rates.	Chattanooga Combination Rates.
Bolivar	118 miles	33 miles	91+50=141	114+28=142
Stevenson	113 "	38 "	91+50=141	114+30=144
Bass	107 "	44 "	91+49=140	114+31=145
Anderson	103 "	48 "	91+46=137	114+33=147
Sherwood	97 "	54 "	91+45=136	114+34=148
Cowan	87 "	64 "	91+43=134	114+36=150
Decherd	82 "	69 "	91+42=133	114+39=153
Estill Spring.	77 "	74 "	91+40=131	114+40=154
Tullahoma	69 "	82 "	91+38=129	114+43=157
Normandy.	62 "	89 "	91+35=126	114+43=157
Haleys	59 "	93 "	91+35=126	114+46=160
Wartrace	55 "	96 "	91+34=125	114+46=160
Belle Buckle	51 "	100 "	91+32=123	114+50=164
Fosterville	46 "	105 "	91+31=122	114+50=164
Christiana	42 "	109 "	91+30=121	114+50=164
Winsted.	37 "	114 "	91+30=121	114+50=164
Murfreesboro.	33 "	118 "	91+25=116	114+50=164
Florence.	26 "	125 "	91+22=113	114+50=164
Wade	22 "	129 "	91+22=113	114+50=164
Smyrna	20 "	131 "	91+20=111	114+50=164
Lavergne.	16 "	135 "	91+15=106	114+50=164
Kimbro.	13 "	137 "	91+15=106	114+50=164
Mount View.	11 "	139 "	91+15=106	114+50=164
Antioch	9 "	141 "	91+12=103	114+50=164
Giencliffe.	5 "	146 "	91+12=103	114+50=164

On all the other classes as well as Class 1, the Combinations are in favor of Nashville.

The following table gives the combination of Class 1 rates from New York to Nashville and Chattanooga with the local rates from those points to certain stations in Tennessee, Missis-

sippi and North Alabama ; also distances from Chattanooga and Nashville to those stations :

To	Distances.		Rates.	
	From	From	Nashville	Chatta-
	Nashville.	Chatta- nooga.	Combination.	nooga. Combi- nation.
	Miles.	Miles.		
Winchester, Tenn.	85	72	\$1.33	\$1.53
Scottsboro, Ala.	131	56	1.46	1.55
Stevenson, Ala.	113	38	1.41	1.44
Gurley's, Ala.	146	81	1.46	1.58
Hollywood, Ala.	126	51	1.46	1.55
Woodville, Ala.	147	72	1.46	1.57
Paint Rock, Ala.	151	76	1.46	1.57
Cowan, Tenn.	87	64	1.34	1.50
Decherd, Tenn.	82	69	1.33	1.53
Gadsden, Tenn.	210	92	1.63	1.71
Anniston, Ala.	271	137	1.63	1.71
Huntsville, Ala.	146	97	1.35	1.54
Meridian, Miss.	360	296	1.74	1.91
Enterprise, Miss.	376	312	1.90	2.07
Decatur, Ala.	121	122	1.35	1.54
Florence, Ala.	126	173	1.35	1.64
Sheffield, Ala.	131	170	1.35	1.64
Tuscumbia, Ala.	134	165	1.35	1.64

Nashville, it will be perceived, has the advantage in rates over Chattanooga at all these stations, many of which are beyond Chattanooga from Nashville. For example, at Gadsden, Alabama, 210 miles from Nashville and 92 miles south from Chattanooga, the Chattanooga combination rate exceeds the Nashville combination rate by 8 cents.

The following table gives the excesses of what are termed the Nashville *combination distances* over the Chattanooga *combination distances* to the stations named in the preceding table and also the excesses of the Chattanooga combination rates over the Nashville combination rates in cents per hundred pounds and on carloads of 40,000 pounds. By combination distances is meant the distances from the point of shipment, New York in this instance, to Chattanooga and Nashville, respectively, added to the distances from those points to the stations named :

Excesses of Nashville combination distances over Chattanooga combination distances.		Excesses of Chattanooga combination rates over Nashville combination rates.	
		In cents per 100 lbs.	On car-loads of 40,000 lbs.
Winchester.	164 miles	20 cents	\$80.00
Scottsboro	226 "	9 "	36.00
Stevenson.	226 "	3 "	12.00
Gurleys.	216 "	12 "	48.00
Hollywood	226 "	9 "	36.00
Woodville.	226 "	11 "	44.00
Paint Rock	226 "	11 "	44.00
Cowan.	174 "	16 "	64.00
Decherd	164 "	20 "	80.00
Gadsden.	269 "	8 "	32.00
Anniston.	285 "	8 "	32.00
Huntsville	200 "	22 "	88.00
Meridian	215 "	17 "	68.00
Enterprise	215 "	17 "	68.00
Decatur	150 "	19 "	76.00
Florence	104 "	29 "	116.00
Sheffield	112 "	29 "	116.00
Tuscumbia	120 "	29 "	116.00

The shortest all-rail line from New York to Chattanooga is via Alexandria, 846 miles; that to Nashville is via Alexandria and through Chattanooga, 997 miles. It is shown that the greater part of the freight moving from the east to both Nashville and Chattanooga moves via Norfolk, sea and rail. Chattanooga, therefore, is materially nearer both the markets of production and shipment, and Norfolk, the point where for the most part the sea carriage ends and the rail haul begins. Nothing else appearing, it would seem clear upon this situation that Chattanooga should have even lower rates than Nashville. The reverse, however, is the fact, and this is, in large part, the cause of complaint. Upon what theory is this reverse order of rates—lower for the long haul to the more distant point—justified? The justification is put mainly upon the ground of Nashville's closer proximity to the territory north of the Ohio River where a lower scale of rates have been fixed by the associated carriers of that territory than by the associated carriers in southern ter-

ritory by practically the same methods and upon the ground that Nashville desires to meet in competition the cities on the Ohio River, and St. Louis in the region between these cities and Nashville.

The same theory that justifies and requires rates to Nashville which accomplish this purpose would seem from equal necessity to require a like adjustment of rates to Chattanooga to give her a fair chance in competition with Nashville in territory between that city and Chattanooga. But this has been utterly ignored in the framework of this adjustment of rates by the singleness of action of the associated carriers south of the Ohio River. Chattanooga is not only met in substantially all the region between the two cities by Nashville with an overwhelming advantage to the latter, but is overreached by the advantages of the latter in rates to many important points south of Chattanooga. Not only is this true, as will be seen by the combination of rates on eastern traffic which as to Nashville passes through Chattanooga on through rates from the East and then out from Nashville in distribution by Nashville jobbers back through and around Chattanooga, but Chattanooga is, by the methods of rate making in vogue in this territory, grouped with a large number of other places far to the south and west of her taking the same rates under this so-called "equalized system," so that these places have their natural disadvantages of location overcome by more favorable rates to the detriment of Chattanooga, which is not only nearer the points of production and shipment than most of the places in this group but is also much nearer to the Virginia cities, Ohio River points, and Nashville, all of which enjoy the lower scale of Official or Trunk Line rates and classifications.

Again, Nashville has the further advantage as against Chattanooga in that the former is favored with a large list of special commodity rates on important articles which are denied to Chattanooga, thus widening the disparity already caused by the difference in class rates.

The Commission has found, as stated in its report in this case, that "there has been no competition affecting rates since the rates were established by the Southern Railway & Steamship Association more than 18 years ago."

I submit that, though the carriers are entitled to a reasonable return on their investment devoted to the public service so far as the same can be earned by lawful methods, the public is equally entitled to the benefit of rates resulting from lawful practices and from normal and unrestrained competition. The reasonableness of the rate, therefore, cannot be tested alone by the percentage of profit on the investment independent of the fact of lawful competition or the unlawful restraint thereof and the enforcement of agreed rates contrary to the policy of the law. One of the avowed purposes of the Southern Railway & Steamship Association was to secure "the greatest amount of net revenue to all the companies parties to this agreement."

In the argument of the case in court for the enforcement of the previous order of the Commission counsel for the carriers said: "The Louisville & Nashville Railroad is vitally interested in maintaining the commercial importance of Nashville," and urged there as in this case that rates to Nashville not higher than at present are necessary "to enable Nashville to compete with Cincinnati, Louisville and Evansville in the territory between Nashville and the Mississippi River." I repeat that like reasoning would, upon the undisputed facts of this case, entitle Chattanooga to such rates as would give her a fair chance in competition with Nashville in the territory between the two cities, and certainly in that south of Chattanooga. Nor can the Louisville & Nashville Railroad, in the light of the testimony in this case, disclaim responsibility in common with the other carriers for the rates and adjustments in question. What concessions one to another these carriers have made from time to time during the 18 or 20 years they have maintained these rates and adjustments, and what compromises of the views and purposes of individual carriers in respect thereof, in disregard of that equality of treatment to all which the law enjoins, have been made in their conferences in order to avoid competition in rates and secure the greatest net revenue to themselves, we do not know. This can probably never be shown, for these things are "done in a corner." But it is not probable that this adjustment and scale of rates could have remained intact, as

10 I. C. C. REP.

shown, for so long a period except by the substantial agreement of the carriers in restraint of competition.

Chattanooga has been complaining of and protesting against these rates continuously for more than fourteen years. The foregoing facts and other testimony in the case indicate the extent and hurtfulness of the discrimination against that city; also the excessiveness of the rates to Chattanooga. The facts seem to me to be convincing that the complaint is well founded and that the rates should be condemned by an order to that effect.

10 I. C. C. REP.

No. 664.

IN THE MATTER OF THE TRANSPORTATION OF
SALT FROM POINTS IN MICHIGAN TO MIS-
SOURI RIVER POINTS AND INTERMEDIATE
LOCALITIES.

Decided March 12, 1904.

Manistee and Ludington are salt producing points in Michigan, and salt shipped from those points to places on the Missouri River is carried by a boat line on Lake Michigan to Chicago, and by railroads from Chicago to the Missouri River. The through rate is 53 cents per barrel of which the boat line receives, according to the destination, from 30 to 33½ per cent, amounting to from 16 to 18 cents per barrel. Established vessel lines on the lake formerly carried the salt to Chicago for from 8 to 11 cents per barrel, but additional services are rendered by the boat line, including stowage at points of shipment and unloading, cooperage, docking, storage, insurance, handling and loading in cars at Chicago, representing a cost of about 8½ cents per barrel. The boat line and the salt are owned by distinct corporations, but the same persons own controlling interests in both corporations. Salt interests at Detroit complained that this division to the boat line amounted to a rebate from the tariff to the salt shippers from Manistee and Ludington and enabled them to undersell Detroit salt in the Western markets. It further appeared that coal used in producing Detroit salt costs on the average about 75 cents to each ton of salt, while Manistee and Ludington salt producers also operate lumber mills and use the refuse from lumber manufacture for fuel in the salt works. *Held*, That it is no part of the duty of the Commission to equalize differences in the natural advantages of localities through the adjustment of tariff rates, and that upon the facts shown in this investigation it does not appear that the share of the through rate allowed to the boat line is so grossly disproportionate to the value of the entire through service as to amount to a rebate in favor of the salt interests of Manistee and Ludington, which also control the boat line.

J. T. Marchand for the Commission.

Runnells & Burry for the Michigan, Indiana & Illinois Line.

10 I. C. C. REP.

REPORT AND OPINION OF THE COMMISSION.

FIFER, *Commissioner*:

Informal complaint having been made, the Commission, upon its own motion, ordered these proceedings of inquiry and investigation and made the following carriers respondents:

The Atchison, Topeka & Santa Fe Railway Company, the Chicago, Burlington & Quincy Railroad Company, the Chicago & Alton Railway Company, the Illinois Central Railroad Company, the Chicago, Milwaukee & St. Paul Railway Company, the Chicago & Northwestern Railway Company, the Wabash Railroad Company, the Grand Trunk Railway Company, the Lake Shore & Michigan Southern Railway Company, the Michigan Central Railroad Company, the Pere Marquette Railroad Company, and the Michigan, Indiana & Illinois Line, hereinafter designated as the Boat Line.

Previous to the entering of this order representation had been made to the Commission through an informal complaint by J. M. Mulkey, President of the Detroit Salt Company, that by virtue of a traffic arrangement between the Boat Line operating a line of steamships between Manistee and Ludington, Michigan, and Chicago, Illinois, and certain western lines of railway leading out of Chicago, Benton Harbor and Michigan City, discrimination in freight rates on salt resulted in favor of Manistee and Ludington shippers as against shippers of salt located in and about Detroit, including Saginaw and the St. Clair Valley.

It was further complained that the International Salt Company doing business at Manistee and Ludington were virtually the owners of the Boat Line; that through rates on salt shipped from Manistee and Ludington to the West were so divided that the Boat Line received from the various railway lines participating in the joint tariff from 30 per cent to 33⅓ per cent of the through rate, a division so excessive in favor of the Boat Line that it amounted, by reason of alleged joint ownership of the two companies, to a rebate to the International Salt Company of from 8 to 10 cents per barrel; that this advantage to the Manistee and Ludington shippers operated to 10 I. C. C. REP.

the disadvantage of shippers of salt in the Detroit field, shutting them out of territory in the West in which they should, under just tariff conditions, be able to operate at a profit, and could do so, were it not for the low prices for salt made by the Manistee and Ludington shippers rendered possible by reason of the rebate allowed to the Boat Line.

It was claimed that through the tariff arrangements made by the Western trunk lines with the Michigan, Indiana & Illinois Boat Line to the exclusion of other boat lines on Lake Michigan, the former boat line gets from 30 per cent to $33\frac{1}{3}$ per cent of the through rate to the Missouri River which is 53 cents per barrel, which is made by adding to the railway rate of 46 cents per barrel 7 cents per barrel from Manistee and Ludington to Chicago; that, thus, the railways give up to the Boat Line about 16 cents per barrel for service which was, previous to the organization of that company, performed by other steamship lines for from 7 to 8 cents per barrel.

It was further alleged that while salt could ostensibly be shipped from Detroit as cheaply as from Ludington and Manistee, the division of the westbound through rate from Manistee and Ludington afforded a rebate of 8 cents per barrel to the shipper of Manistee and Ludington salt, and operated to the disadvantage of the Detroit field salt.

Pursuant to the order of the Commission a hearing was held at Chicago on April 1, 1903, which was adjourned after taking the testimony of a number of witnesses until May 21, 1903, on which date the evidence in the case was concluded. And on August 26, 1903, the case was finally submitted on brief and argument.

At the opening of the adjourned hearing on May 21, the following petition was read:

"May 14, 1903.

"To the Honorable Board of Interstate Commerce Commissioners, Washington, D. C.

"Gentlemen:

"In view of the fact that many of us find it inconvenient to be present at the hearing before your honorable body in Chi-

10 I. C. C. REP.

cago on the 21st instant, we desire to petition you for a relief from the unfair and, we believe, unlawful competition now being practiced by railway lines west and south of Lake Michigan, in which so-called transportation companies owned and operated by those interested in the salt business are given a division of the through rate, resulting in a rebate. We confidently believe that unless stopped it will in the end result in a general demoralization of rates, not only on salt but other commodities; further, if allowed to continue, will make it impossible for manufacturers located on railroad lines alone to do business.

"There are now in operation on the Great Lakes four different transportation lines used in the transportation of salt, and of necessity more must follow unless these are discontinued.

"Yours truly,

(Signed) "ROUGE RIVER SALT COMPANY,

W. H. IRVINE, *President*,

WM. W. KELLY.

"WALTON SALT ASSN. (Ltd.),

S. B. POWERS, *Manager*.

"SALLIOTTE & FERGUSON.

"PENINSULA SALT COMPANY,

J. R. BEAMER, *Secretary*."

Similar petitions were presented from the Colonial Salt Company of Akron, O.; the United Salt Company of Cleveland, O.; the Cleveland Salt Company, and the Ohio Salt Company. All of the aforesaid petitions were placed on file.

FACTS.

There are eleven producers of salt in and about Detroit, of whom three were engaged in manufacture at the time of this hearing, The Detroit Salt Company, of which J. M. Mulkey, one of the Complainants, is President, and two other plants owned by Chicago packers who ship to Chicago and St. Louis. Mr. Mulkey testified that the other eight salt factories were shut down and were not then producing salt on account of the extremely low prices made by the International Salt Company, which he considered were caused by freight rate conditions. These conditions

10 I. C. C. REP.

were changed January 1, 1900. Prior to that date, Detroit had a proportional rate of 20 cents per barrel from Detroit to the Mississippi River. The rate was 10 cents per barrel west bound more than the Chicago rate, which in effect made a rate of 10 cents more per barrel for business over the Chicago rate beyond the Mississippi River. January 1, 1902, the proportional rate was advanced to 25 cents to the Mississippi River, making the rate 15 cents per barrel above the Chicago rate; and since that time the Michigan, Indiana & Illinois Boat Line has been established on the lakes which makes a rate of 7 cents per barrel over the Chicago rate, and by a division of from 30 per cent to 33 $\frac{1}{3}$ per cent given it of the through rate of the Western railways secures from 16 to 18 cents per barrel for transportation from Manistee and Ludington to Chicago; whereas prior to that time, the Pere Marquette and other boats had carried it for about 8 cents per barrel.

Mr. Mulkey testified that, prior to 1900, the Detroit producers sold a good deal of salt at points intermediate to the Missouri River, from which points they are now barred by existing conditions. No shipments can be made, he said, from the Detroit field to such points on the Santa Fe, the Burlington, the Illinois Central or the Rock Island. On the Detroit-Chicago lines there are through rates on salt from Detroit with the Michigan Central and the Pere Marquette. Although the Detroit producers are at better advantage with these two lines they claim to be unable to ship profitably to western intermediate points. The Burlington has withdrawn all joint tariffs with Detroit on salt, from the Mississippi River proportional, forcing every thing through Chicago on the sum of the locals.

The disadvantage under which the Detroit producers labor in attempting to compete with the International Salt Company in the western field is attributed largely by these producers to the alleged excessive division of the through rate accorded to the Boat Line. It is also attributed in part to the fact that with some roads Detroit has not a through westbound tariff on salt, and to the advance to the 25 cents a barrel proportional from Detroit to the Mississippi River.

The Detroit producers claim that they formerly competed

10 I. C. C. REP.

successfully with the 53-cent rate from Manistee and Ludington, the same rate that is now in effect, and assert that they cannot do so now for reasons given in testimony by Mr. Mulkey as follows:

Q. "If the rate is the same why can't you just as successfully compete with it at the present time?"

Mr. Mulkey. "From the fact that the boat line—which has the same officers as the salt company—receives this large division of the through business."

Q. "Your point is that the men who own the salt works at Manistee and Ludington own the transportation line also?"

Mr. Mulkey. "The men who own the salt own the transportation lines, as I understand it—not the men who own the salt works."

Q. "The men who own the transportation lines?"

Mr. Mulkey. "Yes, sir."

Q. "And at the present time that transportation line gets a large division—some 16 cents—you say?"

Mr. Mulkey. "16 to 18, I am informed."

Q. "And your claim is that that is in the nature of a rebate to the same men who own the salt?"

Mr. Mulkey. "Yes, sir."

Q. "Although the deal is made with the transportation line it is to the same men who own the salt?"

Mr. Mulkey. "Yes, sir."

The Michigan, Indiana & Illinois Boat Line is a corporation organized under the laws of Illinois, incorporated in February, 1900. The amount of salt shipped by the International Salt Company from Manistee and Ludington is, approximately, 300,000 tons annually, which all goes through Chicago and is practically all shipped by water on the vessels of the Boat Line. The idea of organizing the Boat Line was to secure for the International Salt Company a line that could be depended on for regular service and to secure a through rate from the salt factories at Manistee and Ludington at as low a figure as possible, the competition being the all rail lines from Saginaw, Detroit and elsewhere.

Prior to the establishment of the Boat Line, the sum of the 10 I. C. C. REP.

local tariffs governed the rates from Milwaukee and Chicago. This arrangement, it was testified by Mr. Joy Morton, President of both the salt company and the boat company, was agreeable to the salt company, and would be now but that the Michigan lines having a proportional agreement up to the Mississippi River made through rates which cut the local rate from Chicago. For instance, the rate was 20 cents a barrel from Detroit to the Mississippi on business for Omaha. The line west of Chicago got 35 per cent or 7 cents a barrel. Then they carried it from the Mississippi on to Omaha at 10 cents less than the Chicago rate, which made a reduction in the rate of 30 cents a barrel, which had been the rate for many years prior to the formation of the boat line. They made the rate 7 cents a barrel from Chicago above the Mississippi River rate which for a Detroit shipper was 27 cents; whereas the International Salt Company shipping from Manistee and Ludington paid 30 cents.

Mr. Joy Morton testified that, prior to the establishment of the Boat Line, the salt company had the service of the Pere Marquette Railroad's boats which was very unsatisfactory, carrying salt only when they had nothing else to carry. It was, he said, absolutely necessary to secure better service. The Boat Line boats are run one way empty, taking no load from Chicago to Manistee and Ludington, so that the cost is more to the Boat Line than it was to the Pere Marquette line. Before the organization of the Boat Line the salt shippers tried the Goodrich Transportation Company and the Seymour and other Lake lines, but claimed that they were unable to obtain transportation at all times when it was needed.

The transportation of salt from Manistee and Ludington by vessels is, it is claimed, a physical necessity for the following reasons:

These shipping points have practically no in-bound business. They are places of no general commercial importance, aside from the lumber and salt trade. There is no making of empty cars at these points. Detroit is a great manufacturing and jobbing center, with a resulting ample supply of empty cars. Railways transporting salt from Manistee and Ludington find it necessary to send empty cars long distances to those points in-

curring heavy expense from loss of car service and for moving the empty cars.

For this reason and on account of the fact that the Boat Line delivers to the railways on board their own cars, avoiding certain terminal expenses, it is claimed the railways are given a great advantage in a joint rate with the Boat Line.

The Boat Line is asserted to be a common carrier. It is ready to carry salt for any person offering it, or anything else besides salt that might be offered, but in point of fact no such freight has been offered and the line is exclusively engaged in transporting salt for the International Salt Company.

The International Salt Company is not a producer of salt but handles, as sales agent and purchaser, the entire product of the Manistee and Ludington region, including that of the Bulkley Salt and Lumber Company, the R. G. Peters Salt and Lumber Company, the Manistee Lumber Company and the State Lumber Company. This year the International Salt Company bought from the various manufacturers 1,500,000 barrels of salt.

Joy Morton is President of the International Salt Company and is also President of the Boat Line. Mark Morton is Treasurer of both companies. Joy Morton and Mark Morton own a controlling interest in both companies. Certain persons other than the Mortons own stock in both. It was testified that the two corporations are entirely distinct, and that no part of the earnings of the Boat Line is passed over to the salt company; that the International Salt Company pays freight to the Boat Line upon every pound of freight transported for it by the latter company; that there is no rebate or manipulation of the earnings of the Boat Line by which any portion of them accrues to the assets of the salt company.

Prior to the establishment of the Boat Line, steamers had carried the Manistee and Ludington salt to Chicago for about 8 to 11 cents per barrel, whereas the proportional of the through rate allowed to the Boat Line by the participating western railways is 16 to 18 cents per barrel. The through rate from Manistee and Ludington to the Missouri River is 53 cents, 10 I. C. C. REP.

which is made by adding to the local rate of 46 cents from Chicago, 7 cents per barrel across the lake. In the division of this rate, the railways allow the Boat Line from 30 per cent to $33\frac{1}{3}$ per cent on business beyond the Mississippi River, or from 16 to 18 cents per barrel for the transportation across lake. The effect of this division, together with the intimate relations existing between the salt shipping company and the boat line, it is alleged by the Detroit shippers, is to absolutely bar the Detroit salt people from business west of the Mississippi through the Chicago gateway, and to render it impossible for them to do business at a profit on lines on which these rates are in effect through St. Louis, Hannibal, Quincy and Keokuk.

The Boat Line pays to the International Salt Company 5 cents per barrel on salt for the use of docks of the latter company and for certain handling. The International Salt Company has docks at Chicago, South Chicago, Milwaukee, St. Joseph, Benton Harbor, Michigan City and Duluth. It receives the salt from the boats, stores, handles, reloads, insures and takes care of it until it is delivered. This service last year cost \$187,153.75 or 6.46 cents per barrel, for which the salt company receive from the Boat Line 5 cents per barrel. In other words, it cost the salt company 1.46 cents per barrel more than 53 cents, the joint rate, to transport salt, Manistee and Ludington to Omaha.

The International Salt Company claims that it failed to do business successfully from the works by all-rail transportation for the reason that it could not obtain cars and supply orders promptly. Docks are necessary for prompt delivery. After deducting the dockage charges the Boat Line has a balance of about 8 to 9 cents per barrel. The fixed charges incurred by the Boat Line in the transportation of salt across the lake amount to 8.5 cents per barrel, composed of the following items: Charge for stowing by stevedores at Manistee and Ludington 1 cent per barrel, unloading and cooperage at Chicago 2.5 cents per barrel, dockage charges already referred to 5 cents per barrel.

General Manager Tracy of the Boat Line was interrogated as to the point whether or not any rebate is paid from

10 I. C. C. REP.

the tariff on salt to the International Salt Company. The following testimony was added:

Q. "Do you know whether there is any account taken of the rate, what division of the rate you get for transportation in settlement with the Salt Company, whereby that is used as a rebate?"

Mr. Tracy: "There is none whatever. The Salt Company pays the published rate from Manistee on every pound we handle."

Q. "And that goes into the treasury of the transportation company?"

Mr. Tracy: "That goes into the treasury of the transportation company."

Q. "There is no manipulation?"

Mr. Tracy: "None whatever; we conform with the laws of the United States as nearly as we understand them. The only compensation the salt company receives from the M. I. & I. line is where they furnish us storage, and that is on a written contract."

Q. "Is that made excessive in order to cover a portion of this transportation?"

Mr. Tracy: "No, sir; it is the cheapest storage that I know of anywhere in the world."

In addition to the Boat Line various other steamship lines are operated on the lakes under the same, or quite similar, conditions as those surrounding that company. These include the Sheboygan and Port Huron Transportation Company, which is being merged, or transformed, into the Great Lakes Transportation Company; the Ludington Transportation Company and the Michigan & Ohio Transportation Company of Detroit. These companies publish through tariffs in connection with various western lines, including the Chicago & Northwestern and the Chicago, Milwaukee & St. Paul, on salt from Manistee, Ludington and Port Huron via Sheboygan, Manitowoc, Milwaukee and Chicago, the rate being 53 cents to the Missouri river, the same as that via the Boat Line, and the division accruing to these boat lines about 30 per cent as in the case of the M. I. & I. The relations of these boat lines to various salt shipping companies are

10 I. C. C. REP.

much the same as those described in the case of the M. I. & L. Boat Line.

The National Salt Company of New Jersey, in 1899 entered into a contract with the Detroit Salt Company whereby the Detroit Salt Company sold all its product for five years to the National Salt Company and stipulated that, in case of failure to move the salt produced by the Detroit Company, the National Company should pay certain liquidated damages, the result being that the National Salt Company did not remove the Detroit Company's product and the latter received liquidated damages in the amount of \$144 per day from March 14, 1901, until the middle of July, 1901, while their factories were standing idle. The Detroit Salt Company is one of the companies which, it is alleged, has been compelled to stop business on account of discriminating rates.

In 1895 J. M. Mulkey, one of the Complainants, entered into a contract with the Wabash road whereby the Wabash, in consideration of Mulkey's building salt works on the River Rouge near Detroit and from time to time enlarging the same and protecting the interests of the Wabash at competitive points and giving the Wabash the preference at such points where the rates are the same, agreed to give Mulkey rates on slack, pea and nut coal that should not exceed 85 cents per ton from Fairmount to Detroit and \$1 from greater distances on the Wabash east of the Mississippi River. The Wabash also agreed to maintain the established differentials, during the term of the agreement, that then existed in favor of Detroit. This contract dated in 1895 was renewed and is still in force. The main feature of this contract was the differential regardless of tariffs which the Wabash agreed to maintain—a differential as against Manistee and Ludington of 8 cents.

At the time this contract with the Wabash went into effect, Saginaw salt was manufactured by exhaust steam, and it was understood that no Detroit manufacturer could live against that competition; and Mr. Mulkey testified that, as the Wabash was getting no salt business from any other source, it wanted the salt from the plant at Detroit.

As to his complaint and the change in conditions which he believed should be made, Mr. Mulkey testified as follows:

Mr. Mulkey: "We simply ask the railroads to restore the rate to what it has been in the past."

Q. "What figure did you want it restored to—53 cents was it, you wanted it restored to?"

Mr. Mulkey: "If the rate is 46 cents from Chicago, which it is now, I want to pay (from Detroit) 56 cents, or 10 cents more than the Chicago rate."

Q. "What is the rate from Manistee that you complain of?"

Mr. Mulkey: "What I complain of is the giving of a boat line, controlled by the salt interest, 33 $\frac{1}{3}$ per cent of one through rate, which allows them 17 cents for hauling which costs but 8 cents."

Q. "Then you have no complaint of the gross rates, have you?"

Mr. Mulkey: "No, sir."

Q. "You have absolutely no complaint to make here of rates? You only complain of a certain division between the Boat Line and the railroad?"

Mr. Mulkey: "I complain whenever the rate gets more than 10 cents more than the Chicago rate."

Mr. Tracy, General Manager of the Boat Line, defended the proportional of the through rate accorded to his company in the following language:

"We have the right to say to the C. B. & Q. as any man would say in making a trade in any commercial transaction: 'If you go to Manistee or Ludington for your salt for Omaha by the Pere Marquette road you will have to give the Pere Marquette railroad earning based on 296 miles rail haul. If you go to Manistee or Ludington for your salt for the Missouri River by the way of Milwaukee you will have to give the Chicago & Northwestern or the Goodrich Line, or the Wisconsin Central or the Chicago, Milwaukee & St. Paul to haul the salt from Milwaukee to you 30 per cent of the rate from Milwaukee to the Missouri River for bringing the salt from Milwaukee to Chicago, and in addition to that you will have to get the across-lake line to bring salt to Milwaukee. That will cost you more 10 I. C. C. REP."

money than the proposition we make to you, which is the present division.'

"I hold that we are entitled to take advantage of all the conditions in making a division of the through rate with these roads that come to Chicago for salt and cannot get to Milwaukee and these other places.

"I say when we perform a service from Manistee and Ludington to Chicago for railroads that do not go to Milwaukee, Sheboygan or Manitowoc, and who are obliged to find a connection from Chicago to this great salt field, we are entitled to a division of the rate which would accrue to the only other way that they could get to the salt, which would be by rail."

As a matter of fact, were the salt carried by rail from Manistee to the Missouri river, the carrier transporting it to Chicago would, upon a mileage basis, be entitled to a division of 36.2 per cent of the through rate.

Mr. Keepers, of the Illinois Central, testified in regard to the strength of position held by the carrier with whom freight originates, and which is available in securing, by the originating carrier, an advantageous division of a through rate. He said, as illustrating this fact, that freight brought from Milwaukee by the Goodrich Steamboat Line to Chicago and thence shipped west paid the Goodrich Line 30 per cent of the through rate to destination, although, at the same time, the all-rail rate to such destination was the same from both Milwaukee and Chicago. For instance, if the Northwestern road received the freight at Milwaukee and carried it west, whether through Chicago or not, it got the whole of the through rate. If, however, the Goodrich Line secured the freight and brought it to Chicago, and then turned it over to the Northwestern road, the Goodrich Line would receive 30 per cent of the through rate for so doing.

The distance from Manistee to Chicago is about 185 nautical miles or 206 statute miles. The mean distance from Chicago to the Missouri river is 512 miles. A division of the rate of 53 cents from Manistee to the Missouri river, made upon the basis of mileage as given above, would give the Boat Line approximately 29 per cent and the railway 71 per cent. The present division of the rate gives the Boat Line from 30 per cent to

331 $\frac{1}{3}$ per cent and the railway from 70 per cent to 66 $\frac{2}{3}$ per cent.

It costs more to manufacture salt at Detroit and throughout the Detroit field than to manufacture it at Manistee and Ludington. In manufacture at Detroit coal is used for fuel, which at the time this hearing was held cost \$1.80 per ton. One ton of coal is used in producing two tons of salt, so that the expense for fuel in manufacturing salt at Detroit is 90 cents per ton. At Manistee and Ludington the manufacturers of salt also manufacture lumber, and the refuse of their lumber mills in the shape of saw dust, bark, slabs, and other stuff, almost valueless for other purposes, is used for fuel. The Detroit manufacturers are, therefore, at a disadvantage of about 90 cents per ton in the expense of production on account of which the International Salt Company asserts that it can undersell the Detroit producers. Coal at Detroit has in the past been as low as \$1.20, and \$1.50 may be considered the average price, which would make the average expense for coal in making a ton of salt at Detroit, 75 cents.

It was claimed by Mr. Tracy, Manager of the Boat Line that in regard to the rates as between Detroit and Manistee and Ludington, Manistee and Ludington are merely maintaining the advantage to which they are entitled by geographical position. When the Boat Line Company was organized, and published its first tariffs, the rate on salt from Detroit to the Mississippi was on the basis of 25 cents a barrel, published by all the Detroit lines effective January 1, 1900. The rates published by the Boat Line give Manistee and Ludington a differential of 8 cents per barrel in their favor as against Detroit, which Mr. Tracy testified, has not been objected to until quite recently. He claimed that, by reason of the difference in distance to western points of about 250 miles in favor of Manistee and Ludington, they are entitled to this 8 cents as against Detroit, Port Huron and Saginaw. At the time of the hearing the Pere Marquette was publishing the same rate from Detroit through Ludington to Omaha that it published and the Boat Line published from Manistee, although in making the carriage from Detroit the Pere Mar-

10 I. C. C. REP.—11.

quette had an all-rail haul of 244 miles before reaching Lake Michigan.

Detroit has advantages over Manistee and Ludington rate to valuable territories, in the same way that these points have advantages over Detroit, in other fields. On eastbound business, Detroit takes 78 per cent of the Chicago-New York rate, while Manistee and Ludington are held at 100 per cent. The Detroit rate to East St. Louis is 22 cents a barrel on salt while the Manistee rate is held at 33 cents by agreement of the Michigan roads. The Detroit rate to Louisville is 30 cents per barrel while Manistee and Ludington take 37 cents.

Mr. Tracy claimed that in the matter of west-bound business, Manistee and Ludington are entitled to a differential in like proportion to that granted to Detroit on east-bound and south-bound business as related to distance; and that the Manistee and Ludington shippers, if given an equal rate basis to the middle and western states, would be able to market their salt in that territory and to materially reduce the price of salt to consumers therein.

The distance from Manistee to Chicago by the Pere Marquette railway is 296 miles. The mean distance from Chicago to Omaha is 512 miles. The mean distance from Detroit to the Mississippi river is 527 miles, the short line 488. The mean distance from Detroit to Chicago is 299 miles, the short line 272.

CONCLUSIONS.

In this case it is alleged that shippers of salt at Detroit, Michigan, are discriminated against by reason of the operation of a traffic arrangement between the Boat Line and certain lines of railway leading to the west out of Chicago; that the International Salt Company and the Boat Line are owned by the same people; and that the division of the through rate of 53 cents per barrel on salt from Manistee and Ludington to the Missouri River allowed to the Boat Line—a proportional of from 30 to 33 $\frac{1}{3}$ per cent of the through rate—amounts, by reason of this common ownership of the two corporations, to a rebate of 8 to 9 cents per barrel in favor of the salt company.

10 I. C. C. REP.

It is complained also, that, through this advantage to the salt company, that corporation is enabled to place its product on the western market at a price approximating 10 cents per barrel lower than the Detroit shippers, who claim they are shut out of territory in which they would, were it not for the practice complained of, be able to do business at a profit.

It is clear the water rate cannot be considered by us apart from the through rate for the reason that the Commission has no jurisdiction over the water rate from Manistee and Ludington to Chicago when considered purely as a local rate. We are not considering local rates, nor have we under consideration the reasonableness of the through rate. That rate was not questioned on the hearing and no evidence was offered in relation thereto. The question calling for decision is the reasonableness of the division of the through rate and we are asked to condemn this division by reason of the fact that the initial carrier and the salt have a common ownership, and because the division awarded the water carrier is so grossly excessive as to amount to a rebate.

Before considering this question, which seems to be the only one of importance made by the record, we will indulge in a few general observations respecting the traffic conditions surrounding the shipment of salt from Manistee and Ludington on the one hand and Detroit on the other.

The complaint of the Detroit shippers that, on account of existing tariffs, they are debarred from western territory is answered by the claim of the International Salt Company that, by reason of the geographical location of Manistee and Ludington, they are entitled to an advantage in western territory and that similar advantage to Detroit over them is secured in eastern territory by existing tariffs. In this connection it may be said that in respect to certain important western and south-western territory naturally tributary to Lake Michigan salt producers, notably St. Louis, Missouri, and Louisville, Kentucky, the tariffs give the advantage to Detroit.

The rate from Detroit to East St. Louis is 22 cents per barrel on salt; from Manistee and Ludington to East St. Louis 35 cents per barrel; from Detroit to Louisville 30 cents per barrel.

10 I. C. C. REP.

rel, and from Manistee and Ludington to Louisville 37 cents. The rates into Columbus, Cincinnati and Pittsburg, and all the territory contiguous to those cities, show relatively the same divisions. On east-bound shipments Detroit takes 78 per cent of the Chicago-New York rate, while Manistee and Ludington are held to 100 per cent. At the present time the Pere Marquette is publishing the same rate from Detroit through Ludington to Omaha that it publishes and the Boat Line publishes from Manistee, notwithstanding that it performs, in addition to the service from Manistee across the lake and on to Omaha, an all-rail haul of 244 miles. The defendant claims that it is entitled to a differential on west-bound business from Manistee and Ludington in proportion to that granted the Detroit producers on east-bound traffic.

Voluminous testimony was given in regard to rates on salt from Manistee, Ludington, Milwaukee, Chicago, and other Lake Michigan points to western territory; also in regard to rates on salt from Detroit to the same field, a specific analysis and consideration of which is not deemed necessary in the view we take of the case inasmuch as one of the Complainants, Mr. Mulkey, testified that he had no complaint to make as to the gross or through rate from Manistee and Ludington and only complained of the division of the through rate.

It will be seen from the facts appearing in the record that salt is manufactured more cheaply at Manistee and Ludington than at Detroit, because at these Lake Michigan points the producers of salt also run lumber mills, the refuse of which, such as slabs, sawdust, bark, etc., almost worthless for other purposes, is used for fuel in salt making, while at Detroit coal is used for that purpose. The average difference in expense of manufacture on this account in favor of Manistee and Ludington is 75 cents per ton, though it sometimes has been as much as 90. This difference in the cost of manufacturing salt between Detroit on the one hand and Manistee and Ludington on the other would afford an ample reason why Detroit is unable to compete with Manistee and Ludington in the western salt market.

The Complainants insist that owing to the tariff conditions

10 I. C. C. REP.

existing since January, 1900, Detroit salt could not be marketed in western territory in competition with the product of Manistee and Ludington, and that therefore, Detroit shippers were damaged. At the same time it is shown that the Detroit Salt Company, one of the complainants, in 1899 entered into an agreement with the National Salt Company, of New Jersey, whereby the Detroit Company sold to the National Company all its product for five years upon the floor of its factory with the stipulation that, in case of failure to move the salt, the National Salt Company should pay to the other certain liquidated damages. This contract has been held illegal and void by a recent decision of the Supreme Court of the State of Michigan as being in violation of the trust laws of that State and of the United States. It is proved that under this stipulation the Detroit Company received liquidated damages at a rate of \$144 per diem from March 14, 1901, until the middle of July of the same year. It is somewhat difficult to see how a change in traffic conditions could have any effect detrimental or otherwise upon the operation of a salt company whose product was already sold on the floor of its factory. It is contended that the complaining witness, Mulkey, is a promoter of salt industries and that this complaint was not brought in good faith, but only to aid him in his speculative enterprises. Whatever may be the fact respecting this matter we feel disposed to consider the case on its merits without regard to the motives which may have controlled Mr. Mulkey in his conduct.

It is said in argument that the Boat Line is not a common carrier, and, therefore, is not authorized to participate in the through rate on salt made by that company and the rail lines. While it is true that the Boat Line is engaged almost exclusively in the transportation of salt for the International Salt Company, it has facilities for transporting all kinds of traffic and is ready to do so should other freight be offered. We are inclined to hold that it may fairly be regarded as a common carrier within the meaning of that term.

“A common or public carrier is one who undertakes as a business for hire or reward to carry from one place to another the goods of all persons who may apply for such

10 I. C. C. REP.

carriage, provided the goods be of the kind he professes to carry and the person so applying will agree to have them carried upon the lawful terms prescribed by the carrier."

Hutch. on Carr., Sec. 47.

We deem it important to inquire whether there was any necessity for the establishment of this Boat Line. Was it established for a legitimate purpose or was it intended as a means of securing rebates to those engaged in the transportation of salt? In this connection the testimony clearly shows that railroads transporting salt from Manistee and Ludington to Chicago and the west were forced by traffic conditions to haul at considerable expense and loss of car service empty cars to Manistee and Ludington for the reason that there is no adequate or reliable supply of empties at these places. This condition of things rendered the rail carriers careless and indifferent to the necessities of the salt traffic. A similar condition surrounded the shipment of salt across lake by the boats of the then existing steamship lines. They transported salt from Manistee and Ludington at such times as suited their convenience, taking it only when they had nothing to transport that paid them better. Nor were the terminal facilities, such as dockage, storage, loading and unloading, etc., satisfactory or adequate. While dependent upon rail transportation and steamers engaged in general traffic, the shippers of salt at Manistee and Ludington were subjected to irregularity and delay in transportation to Chicago, resulting frequently in inability to supply orders and consequent loss of trade. For these reasons the Boat Line was established, and in our judgment the exigencies of the salt business at Manistee and Ludington made the establishment of this water line desirable if not indispensable.

Having adverted to all the minor questions raised by the record, we proceed to a consideration of the more important question as to whether the division of the through rate awarded the Boat Line is in fact a rebate.

The complainants insist that this rebate exists by virtue of the fact that the rate on salt from Manistee and Ludington to Chicago has greatly increased since the establishment of the pres-

ent Boat Line—they say the old rate did not exceed 8 cents per barrel. Mr. Joy Morton, however, testified that under the former arrangement, the salt company was compelled to pay at times as much as 9, 10 and even 12 cents per barrel. The rate now awarded the Boat Line averages about 17 cents per barrel, the amount depending upon the contract made with the western roads.

As a justification of the increase in the water rate since 1900 it is shown that the new service is far more expensive than that formerly in use. Under the old arrangement the salt was received and delivered at the rail of the vessel and the then existing rate covered the cost of carriage only. No terminal charges at either end of the line were borne by the water carrier, while under the present arrangement at the higher rate the former unsatisfactory conditions at the terminals have been succeeded by ample and expensive dockage and warehouse arrangements and facilities, and included in the water carriage are the following fixed charges, namely: 1 cent per barrel for stowage by stevedores at Manistee and Ludington; 2.5 cents per barrel, unloading and cooperage at Chicago; 5 cents per barrel for dockage in Chicago, which includes storing in warehouse at Chicago, handling, insuring, and loading into the cars. And here it may be stated that barrels are broken in unloading and handling in Chicago, rendering cooperage a necessity in the transportation of salt from Manistee and Ludington to the Missouri River by lake and rail; whereas, in the case of through all-rail shipments without change of cars this expense is not incurred.

Thus, it will be seen that the total of fixed charges incurred by the present boat line in the transportation of salt across lake to Chicago is 8.5 cents per barrel, which is in addition to the cost of carriage, and, as we have seen, these fixed charges were not included in the old rate made by the boats formerly engaged in this traffic. Some, if not all, of these new charges, since they are borne by the Boat Line, may, we believe, be properly included in the cost of transportation. It should be noted that in addition to these fixed charges the service rendered by the Boat Line is more expensive than that performed by the former method. Under the new arrangements the boats carry no re-

10 I. C. C. REP.

turn loads to Manistee and Ludington and are required to be ready to carry the salt at all times when shipments are to be made. It can readily be seen that this service is more expensive than that formerly in use.

The testimony shows that the Ludington Transportation Company, the Sheboygan & Port Huron Transportation Company and the Michigan & Ohio Transportation Company, have similar arrangements with the salt producers of Manistee and Ludington to that of the Boat Line in question and the western railways. For instance, the rate from Manistee and Ludington through Milwaukee to the Missouri River is 53 cents, and for carrying salt from Manistee and Ludington to Milwaukee, the Ludington Transportation Company receives 30 per cent of the through rate. The Sheboygan and Port Huron Transportation Company makes a through rate with the roads leading west from Chicago and receives as its division of the through rate, the same proportion as does the Boat Line. The Michigan & Ohio Transportation Company also has a through rate from Manistee and Ludington to the Missouri River through Chicago and receives the same proportion of the through rate.

Having considered all the important reasons advanced as a justification of the division awarded the Boat Line, we will proceed to another branch of the case.

Where a through line is made up of several carriers and for that portion of the line on which the business originates there is but one carrier, but for the latter part of the route there are several carriers, then the originating carrier has an advantage in bargaining concerning the pro-rating of the through business. In this case the Boat Line originates the freight and brings it to Chicago. There are numerous competing lines from Chicago to Missouri River points and the Boat Line has, therefore, the advantage that these lines probably bid against each other for the freight from Chicago to the Missouri River.

It is also true that a line of railway, having a large distributing system from the Missouri River points, could afford to yield a larger proportional to the Boat Line than could a rail line not enjoying these advantages; for the reason that in addition to securing its proportion of the through rate to the river, the for-

mer line would have the hauling of a portion of the salt from the river to the points of consumption. For these and other like reasons the general practice with carriers, we believe, is to allow the originating line a larger division of the through rate than would be awarded to a connecting line for performing an equal service.

It should be noted in this connection that the salt from Manistee and Ludington can reach its western destination through either of two gateways, namely, Milwaukee or Chicago. It is, therefore, plain that roads leading west from Chicago and which have no lines to Milwaukee, might be forced to grant a favorable division to the Boat Line in order to bring the salt to Chicago whereby the rail lines would get a haul of the freight from Chicago to the west; whereas, if it moved through the Milwaukee gateway, the roads mentioned would not be able to participate in the traffic and consequently would receive no revenue therefrom. It cannot be said, however, that a division forced from the roads by reason of the foregoing considerations is unlawful, unless it is so grossly excessive as to amount to a rebate. Initial carriers generally utilize these advantages to their own benefit, and, so far as we know, no complaint has ever been made to the Commission regarding the divisions so obtained. Mr. Morton testified that he had made the best bargain that he could with the roads that join to make this through rate, but that, in his judgment, the Boat Line should have a larger share of the through rate than is now awarded, and others testified to the same effect.

Of the roads leading from Chicago to the Missouri River, those which have no lines to Milwaukee find themselves in this position: If they wish to participate in the carriage of salt from Manistee and Ludington to the Missouri River, they must find some means of bringing the salt to Chicago. It is 296 miles by the Pere Marquette Railroad from Manistee around the foot of Lake Michigan to Chicago; and if the salt is carried by this line and that company receives a division of the through rate based on mileage, its proportional amounts to 36.2 per cent of the entire through rate, which is in excess of the division now complained of. If the salt is carried across by boat to Milwaukee I. C. C. REP.

waukee and then to Chicago by rail, the rail line for this service receives, according to the testimony, 30 per cent of the entire through rate, and to this division must be added the cost of carriage across lake by boat. The total cost of carriage from Manistee and Ludington through Milwaukee to Chicago in this way amounts to 21 cents per barrel, which is also in excess of the division complained of. It will be seen, therefore, that the Boat Line is in a position to demand a favorable division of the through rate.

We again call attention to the fact that the Detroit producers claim that they are driven out of the Missouri River territory by reason of the fact that the Manistee and Ludington producers undersell them in that market, and that Manistee and Ludington are enabled to do this by reason of the large division of the rate awarded the Boat Line. We have already alluded to the natural advantages possessed by Manistee and Ludington in the manufacture and transportation of salt, and those engaged in the transportation of salt from these points insist that by reason of these natural advantages alone they are enabled to undersell Detroit on the Missouri River and that territory naturally belongs to them.

Should we hold with the complainants on this proposition and condemn the division of the rate awarded the Boat Line, it is reasonable to suppose that the effect would be an increase of the price of salt in the western market, and, unless this would happen, such a finding could result in no benefit to complainants. If, however, the division under consideration is improper and illegal, and the complainants are injured thereby, they are doubtless entitled to relief; but additional burdens should not be thrown upon the western consumers of salt, unless that result is justified by all the facts and circumstances appearing in the record. We do not conceive it to be our duty to take away from Manistee and Ludington the natural advantages which they enjoy and place them on an equality with Detroit in the manufacture and shipment of salt, in order that the price of that article in western territory may be increased, thereby enabling Detroit producers to do business at a profit in that market. It is the

duty of the Commission to keep in view not only the rights and interests of producers, but those of consumers as well.

It can be no duty of the Commission to equalize natural advantages between localities through the adjustment of tariff rates. If any carrier desires to foster languishing industries situated on its line for the purpose of increasing the traffic of such carrier, it has, we think, the right to do so; and if the roads leading west from Detroit, with their connections, wish to make a rate whereby the salt producers of Detroit may be enabled to market their product on the Missouri River, they are so privileged; but this fact can in no wise affect the through rate from Manistee and Ludington, nor can it in any way determine the reasonableness of the division received by the Boat Line. This through rate and the division in question must stand on their own merits, and cannot be disturbed unless found to be illegal.

It should be borne in mind that, generally speaking, the public is not interested in the division of a through rate, and the Commission therefore, has no authority to condemn the division of a rate, unless a part of the through line and the article shipped have a common ownership, and a grossly excessive division is made for the purpose of paying a rebate.

While the salt is owned by one corporation and the Boat Line by a wholly separate and distinct corporation, yet a controlling interest in both is exercised by the same persons, and, with one exception, the officers are the same in both concerns. The stockholders, however, are not the same. The relations between these two corporations are so intimate and their financial interests so nearly identical that we should not hesitate to condemn this division of the through rate, provided we could find that the division paid the Boat Line was in effect a rebate.

It appears that the funds of the Boat Line have never been mingled with those of the Salt Company, but on the contrary have been kept wholly separate and distinct. It appears also that while the Boat Line has made some money, it has never been able to pay its stockholders a dividend, its surplus earnings after paying the legitimate expenses of the company having been used in improving its transportation facilities.

10 I. C. C. REP.

The traffic conditions surrounding Manistec and Ludington place the Boat Line in a position to demand a large division of the through rate and a large division has, in our judgment, been received by it. Doubtless the Boat Line made the very best bargain it could with the roads respecting that matter, and to this end utilized every advantage at its command. Under the present state of the law, the Commission has no power to prevent it from so doing, unless, as we have seen, the division is so grossly excessive as to amount to a rebate. It is not sufficient to show that the division awarded the Boat Line is one about which persons informed respecting such matters might differ. It must appear, after considering all the facts and circumstances in the case, that it is grossly out of proportion to the value of the entire through service rendered, and that it in fact covers a rebate. We do not feel justified, from the facts appearing in this record, in so holding, and these proceedings will, therefore, be dismissed.

No. 615.

THE RAILROAD COMMISSION OF KENTUCKY
v.
 THE LOUISVILLE & NASHVILLE RAILROAD COM-
 PANY.

Decided March 17, 1904.

Defendant is party to a contract with the Bourbon Stock Yards Company for the exclusive delivery of live stock in the city of Louisville only to the yards of that company, and when live stock coming over its lines is consigned to the Central Stock Yards, a competitor of the Bourbon Yards, at Louisville, defendant refuses to transfer such live stock to the Southern Railway for delivery to the Central Yards. The defendant ought, in fair consideration of all interests, to deliver to the Southern Railway live stock so consigned to the Central Yards, but the question raised for determination is whether the Commission can by its order require this to be done. Decisions of Federal courts cited and applied and, *Held*,—

1. That defendant in making and carrying out its exclusive contract with the Bourbon Stock Yards Company is not acting in violation of the Act to regulate commerce.
2. That the Act to regulate commerce does not confer upon the Commission authority to make an order affirmatively requiring a railway carrier to deliver carloads of interstate freight to a connecting carrier.
3. That upon the facts of this case it is not an unlawful discrimination between commodities for the defendant to deliver carloads of dead freight to the Southern Railway for consignees in Louisville and to refuse delivery of live stock to the Southern Railway at Louisville when consigned to the Central Stock Yards.
4. That the Commission has no regulating authority beyond that conferred by the terms of the Act to regulate commerce and its jurisdiction does not extend to enforcing provisions in the Constitution of the State of Kentucky.

Dodd & Dodd and W. M. Smith for complainant.

Ed. Baxter, Helm Bruce and Chas. N. Burch for defendant.

10 I. C. C. REP.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, Commissioner:

The Bourbon Stock Yards were built at Louisville, Kentucky, in 1859, and have been from time to time enlarged and improved. They are owned and operated by the Bourbon Stock Yard Company, are situated upon the line of the defendant, the Louisville & Nashville Railroad Company, and can only be reached by rail over that railroad.

September 20, 1888, a contract was entered into between the defendant, Louisville & Nashville Railroad Company, and the Bourbon Stock Yard Company, by the terms of which the stock yards company agreed to provide all suitable and necessary facilities, to load, unload and care for, at its own risk, all live stock which might be delivered to it by the defendant, or which might be presented for shipment over the lines of the defendant, to collect whatever freight money might be due to the railroad company upon incoming freight and pay over the same, and to act generally as the agent of that company in all matters relating to the receipt and delivery of its live-stock shipments. For these services it was to charge no more than other stock yards situated in the city of Louisville, and not to exceed 50 cents per car, and was to charge the public for those services usually rendered by stock yards and not included in the receipt or delivery of the stock, a reasonable price. The railroad company upon its part agreed not to establish a stock yard itself at Louisville, nor to sell land for that purpose, or otherwise facilitate that object. It also agreed to deliver and unload, in so far as it legally could, at the yards of the Bourbon Company all live stock shipped over its lines to Louisville, and to make said yards its exclusive live-stock depot in that city. July 12, 1897, this contract was extended for a period of ten years from the date of its expiration. The parties have been since the execution of the original contract, and still are, operating under same.

In the summer and fall of 1901 the Central Stock Yards were established by a company of that name. These yards are situated just outside the corporate limits of the city of Louisville, upon the line of the Southern Railway, and can only be reached

by that railway. They are similar in use to the Bourbon Stock Yards, were erected as a rival of that enterprise, and when opened for business, in December, 1901, became at once its competitor at Louisville.

Eight or nine independent railroads enter the city of Louisville, and all transport, to some extent, live stock. The only stock yards are the Central and the Bourbon, except one or two small establishments, which are controlled by the latter company. Live stock must therefore be marketed ordinarily at one or the other of these places. The different railroads have at various points and in various ways such physical connection that it is ordinarily possible to send a carload of live stock arriving at Louisville over any line to either one of these stock yards. The Southern Railway makes the Central Stock Yards its live-stock depot, but it and all other lines except the defendant allow the shipper to designate the stock yards at which he desires delivery to be made, and the car upon arriving at Louisville is switched to that destination. The Louisville & Nashville declines to do this, and insists upon making delivery according to the terms of its contract at the Bourbon yards.

The Central Stock Yards Company, claiming this to be a violation of certain provisions of the Constitution of Kentucky, obtained from a state court a mandatory injunction compelling that company to receive at points within the State of Kentucky, bill, transport and deliver to the Southern Railway cars of live stock destined to the Central Stock Yards. In obedience to that injunction, the defendant has for some months past so transported stock from points within the State, but from points without the State it still declines to make delivery except at the Bourbon yards. This proceeding is brought for the purpose of forcing it to deliver live stock taken up by it at points without the State, in the same manner that it now delivers live stock shipped from points within the State. The Railroad Commission of Kentucky acts as complainant agreeably to the provisions of the Act to regulate commerce, and the traffic with respect to which this proceeding is prosecuted and the defendant in the handling of that traffic are subject to said Act.

The defendant alleged as one reason why it ought not to be

10 I. C. C. REP.

required to make delivery to the Southern Railway for the Central Stock Yards that it could only do so at great inconvenience and additional expense. Considerable testimony was introduced by both parties upon this question, and the location of the various points shown by use of maps and otherwise. We do not feel it necessary to report in detail this branch of the case.

There are two points of physical connection between the Southern Railway and the Louisville & Nashville Railroad, at one of which, 7th street and Magnolia avenue, the interchange of freight cars is a matter of daily occurrence. Freight trains arriving over the various divisions of the Louisville & Nashville are at present taken to the South Louisville yards, where they are broken up for further disposition. Cars of live stock are hauled from there by special engine directly to the Bourbon Stock Yards, a distance of some four miles. Freight cars intended for delivery to the Southern Railway are taken to the city yards of the Louisville & Nashville at 9th and Kentucky streets, and from thence are hauled back to 7th and Magnolia and there delivered to the Southern. The distance from South Louisville to 7th and Magnolia is about $1\frac{1}{2}$ miles, and from 7th and Magnolia to the Central Stock Yards about $2\frac{1}{2}$ miles. It did not appear what the distance was from Magnolia avenue to 9th and Kentucky streets, but an examination of the maps in evidence shows that it is not great, not over one-half mile. The defendant daily transports many cars from South Louisville to 7th and Magnolia for delivery to the Southern at that point, from 50 to 75 being interchanged there daily. It is possible that the expense of transferring cars of live stock from the break-up yards at South Louisville to this point, for delivery to the Southern, may be somewhat greater than the cost of taking them to the Bourbon Yards, but the difference must be slight. As we understand the testimony, the defendant is relieved from the payment of the unloading charge of 50 cents per car on all those cars delivered to the Southern for the Central Stock Yards. However this may be, we find as a fact that the defendant can make delivery of carloads of live stock to the Southern Railway for the Central Stock Yards with substantially the same convenience and expense as accompanies a delivery at the Bourbon Yards.

The defendant further urges that it ought not to be required to entrust to any other person than its authorized agent the delivery of this stock and the collection of its charges, and further, that it ought not to be required to yield possession of its rolling stock to a rival railroad company.

The shipment and handling of live stock requires greater care than most kinds of freight. The animals are likely to be injured *in transitu* and frequent claims for damage are made on this score against carriers. It is more or less important that the condition of the stock should be correctly observed at the time delivery is made. Under the contract between the defendant and the Bourbon Stock Yard Company the latter company agrees to discharge this duty in a suitable way, and also to collect and pay over the freight money upon stock delivered to it. Naturally the railroad company prefers to have this duty discharged by an agent directly responsible to it rather than by some party with whom it has no connection. At the same time, we feel that this objection has been made more of in the argument than the facts warrant. These cars of live stock are delivered to the Southern Railway Company. That company is entirely responsible financially. It agrees to be answerable for the speedy and proper delivery of the live stock, and for the collection and payment of the charges of the defendant. To this extent the Louisville & Nashville gives credit to that company habitually in the handling of dead freight. Moreover, it appears that between 200 and 300 carloads of live stock have been actually handled by the Southern Railway to the Central Stock Yards under the injunction of the State court now in effect, and thus far no complaint seems to have been made as to the manner in which the duty of delivering has been discharged. We do not think as a practical matter that there would be much, if any, greater liability to loss or unnecessary friction in case of delivery to the Southern Railway than in case of delivery at the Bourbon Stock Yards. It must be remembered, too, that where freight is shipped with instructions by the consignor to deliver to a connecting carrier the original carrier can fully protect itself against any remissness upon the part of its connection by contract in the bill of lading.

It appears to be the policy of the defendant to retain its freight cars in so far as possible upon its own line. Dead freight intended for shipment beyond the termini of the Louisville & Nashville is frequently transferred to other cars, and the same rule seems to be applied to live stock. Stock intended for shipment to points beyond Cincinnati is invariably transferred at that junction, and the testimony was that such was the general practice of the road. In many cases, however, where public necessity demands from the nature of the freight or the nature of the delivery, cars are allowed to go through to destination. Numerous industries in the city of Louisville have side-tracks and large numbers of cars arriving by other lines are daily switched to destination upon these sidings. It appears that all lines entering the city, including the Louisville & Nashville, receive the cars of other roads when loaded with dead freight, and deliver cars so loaded to other roads to be switched to destination, provided that destination is within the switching limits, and the Central Stock Yards are. If the cars of the defendant are received at Louisville loaded with any kind of dead freight, consigned to the Central Stock Yards, those cars will be delivered to the Southern Railway to be transported to the destination named. It is only in case of live stock that this company alone, of all other companies, refuses to make such delivery. It was said in the argument that the defendant would deliver to the Southern carloads of live stock destined to stations upon its line other than Central Stock Yards. The testimony shows that in some cases such carloads of live stock had been delivered at 7th and Magnolia, but does not show any settled custom in that respect.

As already said, for some months past the Louisville & Nashville has made delivery to the Southern of live stock originating within the State of Kentucky destined to the Central Stock Yards, and testimony was given upon both sides as to the time actually consumed in transporting the stock to the stock yards and returning the empty cars to the defendant at 7th and Magnolia. The estimate of the witnesses upon the part of the complainant was from 2 to 6 hours; that upon the part of the defendant from 2 to 3 days. There appears to be some overstatement

10 I. C. C. REP.

upon both sides, and it also appears that some cars have been detained at the Central Stock Yards by the Southern Railway at the request of the Louisville & Nashville, as the former understood, so that they might be conveniently had if desired for the outward shipment of live stock from the Central Yards. It appears physically possible to unload and return these cars in a few hours, and there is no reason to suppose that they would not be returned within that time if the defendant company so desired. No complaint whatever has been made of delay in the returning of empties, and we do not feel that this excuse is a valid one in fact. We find, as a matter of fact, that there is no substantial reason, looking to the physical operations of the defendant and its responsibility to the public, why carloads of live stock should not be delivered to the Southern by the defendant for the Central Yards.

The defendant also claims that the right to make exclusive deliveries at the Bourbon Yards assists in procuring traffic, and that it ought to be allowed to serve its interests in this respect.

About 50 per cent of the stock marketed at Louisville is shipped out to eastern destinations, and what of it is marketed at the Bourbon Yards is necessarily loaded there also. Inasmuch as the defendant is the only railroad reaching this yard, it has, in virtue of this circumstance, a considerable advantage over other lines in soliciting and obtaining such outbound traffic.

The other 50 per cent of live stock marketed at Louisville is slaughtered there, and of this a considerable portion is subsequently shipped out in the form of various products of the abattoir and the packing-house. These industries are more conveniently maintained in the vicinity of the yards at which the live animals are bought, and being in that vicinity are more naturally tributary to the line of the defendant railroad. Hence, with respect to this traffic the Louisville & Nashville enjoys a certain advantage. We are of the opinion that this claim of the defendant is well taken, and that it is, not perhaps to a great extent, but certainly in a substantial degree from a traffic standpoint, for the pecuniary interest of that company to make exclusive deliveries of live stock at the Bourbon Yards.

The complainant urges that the public interest requires that
10 I. C. C. REP.

the competition which arises out of the existence of these independent stock yards should be kept alive, and that the defendant ought to be compelled in the interest of the public to make deliveries to the Southern when the shipper so indicates. There is some testimony to show that the facilities and the service at the Bourbon Yards in the past have not been all they should be, and that they are not today equal to those of the Central. Upon the whole testimony we are unable to make any definite finding to this effect. The Bourbon Yards were originally built many years ago, but they seem to have been improved from time to time and kept up fairly well with the requirements of Louisville as a live stock market. In the main the facilities have been adequate, the service competent and the charges, if not altogether reasonable, as reasonable as those imposed in similar institutions in other parts of the country. It is quite possible that the Central Yards, being a new plant, are to-day somewhat more modern, perhaps somewhat better than the Bourbon. It does not appear that the charges are less. On the whole, we are unable to find that the public has not enjoyed in the past reasonable facilities upon reasonable terms at the Bourbon Stock Yards.

At the same time we are of the opinion that the interests of the public, in the case of Louisville, at least, have been served by the establishment of the Central Stock Yards as a competitor of the Bourbon, and that public interest requires the continuation of such competition. While several attempts have been made to establish and maintain rival stock yards at this point, such attempts have hitherto come to nothing. In one or two cases stock yards have been actually established, but these have been either driven out of business or absorbed by the Bourbon Company, so that for most of the time during the past that establishment has been the only stock yards at Louisville. As already said, the Louisville & Nashville is the railroad whose line reaches those yards, and all stock arriving at Louisville by other lines is necessarily switched by the defendant to the Bourbon Stock Yards. Previous to the opening of the Central Yards the switching charge imposed for this service had been \$2.00 per car, and we understand that the same charge was imposed

for the movement of outbound cars. At the opening of the Central Yards the Southern Railway established a charge of \$1.00 per car from 7th street and Magnolia avenue to the Central Stock Yards, and this action was immediately followed by a reduction of the Louisville & Nashville charge to a corresponding amount. The public therefore directly benefits by \$1.00 per car on all carloads of live stock which are brought to the city of Louisville over any other line than that of the defendant.

Still further, there are more or less stations in Kentucky and adjoining States from which live stock may move to Louisville over either the line of the Louisville & Nashville or one of its competitors like the Illinois Central. When in the past live stock has been brought to Louisville from such a competitive point over a rival line, the Louisville & Nashville has refused to switch that car to the Bourbon Stock Yards upon any terms, with the result that stock has been unloaded at some other point and driven through the streets of Louisville to the Bourbon Yards in order that it might be marketed there. The purpose of this action upon the part of the defendant was, of course, to force shippers to patronize its line, and the effect was to largely eliminate competition from these otherwise competitive points. The building of the Central Stock Yards has opened to these points the advantages of their competitive location.

While some witnesses in this case testified that in their opinion all stock at Louisville could be most advantageously marketed at a single point, it appears that the shippers of live stock to that market regard the privilege of selling at either one of these stock yards as of material benefit. At the present time stock shipped to Louisville from points without the State of Kentucky destined to Central Stock Yards is taken to the Bourbon Stock Yards, there unloaded, re-loaded into a Southern car, switched by the Louisville & Nashville to 7th and Magnolia, and thence taken by the Southern to its destination. This involves a delay of from 6 to 24 hours and more or less shrinkage in the stock and risk of damage. As we understand the testimony, it costs a loading charge of 50 cents at the Bourbon Yards, a switching charge of one dollar to the defendant and another dollar to the Southern

10 I. C. C. REP.

Railway; yet stock is frequently transported under all these difficulties to the Central Yards.

It is impossible to estimate to its full extent, in dollars and cents, the benefit to the public of this competition, but we are clearly of the opinion that the benefit is considerable. It should perhaps be stated in this connection that more live stock is brought to Louisville over the Louisville & Nashville than over any other one line, or perhaps all lines.

If now it is for the interest of the defendant to make exclusive deliveries at the Bourbon Yards, and for the interest of the public that both yards should be alike open, the question immediately arises, whose interest should control, and this may be a question of fact. The public ought not to be allowed to insist upon the application of some theoretical right when no substantial advantage accrues and when such insistence is to the substantial detriment of the carrier, and upon the other hand the carrier must in many cases give way where the loss to it is insignificant in comparison with the advantage to the public. Treating this as a question of fact in the present instance, and inquiring what ought, upon a fair consideration of the interests of all parties to be done, we think and find that the Louisville & Nashville ought to permit the shipper to designate the point of delivery and to follow that designation. It seems to us that the advantages accruing to the public from free competition between these rival yards and the various carriers entering Louisville is of more advantage to the people who buy, sell and consume live stock and its products than is the right of the Louisville & Nashville to make exclusive deliveries at the Bourbon Stock Yards to that company.

Soon after the opening of the Central Stock Yards for business the Southern Railway established a station at that point, known as Central Stock Yards, Kentucky, and some question is made as to whether this should be treated in disposing of this case as a *bona fide* station. The station was regularly established by the Southern Company, which issued circulars to its various connections stating the rates and the divisions which would apply on business destined to that point. According to this circular the Louisville rate is applied from all stations upon the Southern

Railway system, and upon all business reaching Louisville over that system, and the Louisville rate, plus a switching charge of \$1.00, is applied to business from connecting roads at Louisville. Central Stock Yards is nine miles from the terminus of the Southern Railway at Louisville. This, however, arises from the fact that in running to Central Stock Yards a detour of the city itself is made. The station is without the corporate limits of Louisville, but is only a short distance beyond those limits. It is the live stock depot of the Southern Railway. Live stock billed to any particular destination in Louisville is delivered by the Southern at that destination, but if the destination be simply Louisville the delivery is at Central Stock Yards. It also seems that these yards have been made the live-stock depot for the city of Louisville of the Baltimore & Ohio Southwestern. We find that there is an independent station on the Southern Railway, designated Central Stock Yards, Kentucky, but we further find that this station is strictly competitive in the live-stock business with Louisville, and that it was created by the Southern Railway in the expectation and hope that its existence might be a means of compelling deliveries of live stock at the Central Stock Yards.

The complainant relied upon Sections 213 to 215, inclusive, of the Constitution of Kentucky, which are as follows:

"Sec. 213. All railroad, transfer, belt lines and railway bridge companies, organized under the laws of Kentucky, or operating, maintaining or controlling any railroad, transfer, belt lines or bridges, or doing a railway business in this State, shall receive, transfer, deliver, and switch empty or loaded cars, and shall move, transport, receive, load or unload all the freight in carloads or less quantities, coming to or going from any railroad, transfer, belt line, bridge or siding thereon, with equal promptness and dispatch, and without any discrimination as to charges, preference, drawback or rebate in favor of any person, corporation, consignee or consignor, in any manner as to payment, transportation, handling or delivery; and shall so receive, deliver, transfer and transport all freight as above set forth, from and to any point where there is a physical connection between the tracks of said companies. But this section shall not be con-

10 I. C. C. REP.

strued as requiring any such common carrier to allow the use of its tracks for the trains of another engaged in like business.

"Sec. 214. No railway, transfer, belt line or railway bridge company shall make any exclusive or preferential contract or arrangement with any individual, association or corporation, for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, or for the conduct of any business as a common carrier.

"Sec. 215. All railway, transfer, belt lines or railway bridge companies shall receive, load, unload, transport, haul, deliver and handle freight of the same class for all persons, associations or corporations from and to the same points and upon the same conditions, in the same manner and for the same charges, and for the same method of payment."

CONCLUSIONS.

We have found that the defendant, in fair consideration of the interests of all concerned, ought, when required by the shipper, to make delivery to the Southern Railway for the Central Stock Yards. Can this Commission by its order require this to be done? The complainant bases its claim to such an order upon four grounds:

1. The making of the contract with the Bourbon Stock Yards for the exclusive delivery of all live stock transported over its lines to Louisville is a discrimination under the Act to regulate commerce.

2. The third and seventh sections of that Act require the defendant to deliver its live stock cars to the Southern Railway for the Central Stock Yards.

3. To deliver dead freight to be switched to destination and refuse that same privilege to live stock is a discrimination against the latter species of traffic under the third section.

4. The Constitution of Kentucky, requiring the interchange of cars, is in aid of interstate commerce and should be enforced by this Commission.

I.

The question arising under the first of these propositions

seems to have been definitely settled by the decisions of the Federal courts, the leading case being *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461.

The Kentucky Central Railroad Company entered into a contract with the Covington Stock Yards Company very much like that between the defendant and the Bourbon Stock Yard Company involved in this proceeding. Keith was engaged in the stock yards business at Covington, and had constructed yards for that purpose separated from those of the Covington Company only by the street, and adjacent to the tracks of the railroad company. For a time the railroad company had made delivery at the yards of Keith, but after the making of its exclusive contract with the stock yards company this practice was discontinued. The Kentucky Central Railroad was in the hands of a receiver pending foreclosure proceedings; the receiver had declined to make delivery at the yards of Keith, and a petition was therefore filed by him in the Circuit Court to compel such delivery. The Covington Company imposed a charge for yarding, no matter how short the time during which the cattle remained in its enclosures, and this fact was complained of in the petition.

The court below ordered the Covington Company, which had become a party to the suit, to deliver to Keith, and all other persons, stock received at Covington, free of all charges other than the regular transportation charges, and in default of its consent in writing to do so, directed that the receiver should make delivery of stock consigned to Keith at his yards. From this order the Covington Company appealed.

The Supreme Court affirmed the order of the Circuit Court. In its opinion are laid down two general propositions: First, that it is the duty of a railroad company to provide suitable facilities for receiving and delivering live stock at its stations without additional compensation other than the regular transportation charge, and, second, that the railroad company may provide these facilities by contract with a stock-yards company. While the court does not so declare in express language, the necessary inference from the decision is that a railroad company may provide these terminal facilities for the handling of live stock by making an exclusive contract with a particular stock-
10 I. C. C. REP.

yards company, and that so long as this company imposes no charge for delivering live stock when that stock is taken by the consignee within a reasonable time, such contract is not obnoxious to law.

This case was construed and applied by the Circuit Court of Appeals for the Sixth Circuit to a case exactly like the one before us, in *Butchers' & Drovers' Stock Yards Co. v. Louisville & N. R. Co.* 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed. 35. The Louisville & Nashville Company had entered into a contract with the Union Stock Yards Company, of Nashville, similar to that referred to in the Keith case, by which it had agreed to make the yards of that company its exclusive live stock depot in the city of Nashville. The railroad company paid a certain amount for the loading and unloading of live stock, but no charge was imposed against shippers by the Union Company.

The Butchers' & Drovers' Company was also engaged in the stock business at Nashville, and had constructed stock yards in the vicinity of Front street, in that city. The Louisville & Nashville maintained a spur track along Front street, and permitted various business enterprises to connect with that track by switches, for the purpose of moving in and out carloads of freight. This siding seems to have been about one mile in length. It did not definitely appear what business firms made connection with it, but it did appear that the privilege was accorded to whoever requested it, save that in all cases the freight handled from these switches was dead freight. The yards of the Butchers' & Drovers' Company were separated from this street by a narrow strip of land about 40 feet in width, which had been dedicated to the city. The city had granted, by ordinance, to the Butchers' & Drovers' Company the right to construct its track across this strip, and the court said that the existence of the strip afforded the railroad company no valid excuse for not permitting the connection. The Butchers' & Drovers' Company requested a connection with this track on Front street, and upon refusal brought suit in equity, praying for a mandatory injunction to compel such connection. The Circuit Court dismissed the bill, and the Circuit Court of Appeals affirmed that decree. The opinion of the court was delivered by Taft, Judge, who held that

the Keith case was authority for the proposition that a railroad company might enter into an exclusive contract like that before him and like the one before us. The Keith case was commenced before and decided after the Act to regulate commerce took effect. The Butchers' & Drovers' case was both commenced and decided subsequent to the passage of that Act, and while that statute is not discussed in detail in the opinion, it is expressly referred to and must have been in the mind of the court.

No further examination of authorities upon this point seems profitable. Whatever may have been said by some inferior courts as to the law, or whatever may be the view of this Commission as to the abuses which might flow from an application of the principle to railroad operations in general, these cases must control our decision in the proceeding before us. Upon their authority we hold that the defendant in making and carrying out its exclusive contract with the Bourbon Stock Yard Company is not in violation of the Act to regulate commerce.

II.

Complainant insists that although the defendant may have the right to make stock deliveries at a single point upon its own line, it must nevertheless deliver carloads of stock to connecting carriers. And manifestly there is, in the practical aspect, a wide distinction between the two propositions. It might impose an almost intolerable burden on the defendant if it were compelled to deliver and receive live stock at every stock yards which might be constructed along its line, while it would not be a hardship of the same magnitude, nor indeed ordinarily any hardship at all, to make deliveries to its connections at points of physical junction in due course of business.

To sustain this contention of the complainant necessitates an order requiring the defendant to deliver its cars to the Southern Railway, and the defendant earnestly insists that no law can be made compelling such delivery, since that would amount to a taking of private property without due process of law. We have no doubt as to the authority of the State with respect to intrastate traffic and of the United States with respect to interstate traffic to compel the exchange of loaded freight cars by statute.

10 I. C. C. REP.

Whatever may be true in fact, in theory at least the railway is a public servant, holding its franchises and operating its property charged with a public trust. It cannot use that property as it might strictly private property without reference to the public interests. The business of railroading in this country at the present time is very largely carried on by the interchange of loaded freight cars and cannot be conducted economically, in many cases not at all, except by that practice. It would be strange indeed if the government might not say that railways should, in the furtherance of public convenience, do, under proper terms and conditions, what their universal custom shows to be feasible and necessary. It has not, however, seemed advisable to discuss the authorities upon that point, for whatever the authority of Congress, no legislation going to that extent has, up to the present time, been enacted.

Probably the framers of the Act to regulate commerce supposed that the third section would compel, under certain circumstances, such interchange of cars. A moment's thought will show that every such exchange is a matter of contract between the parties in which the terms and conditions upon which the exchange shall be made are specified, and it is apparent to one at all acquainted with railway operations that to arbitrarily compel the interchange of cars under all circumstances would be unjust. The Act to regulate commerce provides no means for determining when carriers shall be compelled to make this interchange, or for fixing the conditions upon which it shall be made, and in construing that Act the courts have, with practical unanimity, held that carriers were still free to make arrangements of this sort by contract among themselves, and that there was nothing in the Act which authorized either the Commission or the courts to compel one railroad company to deliver its cars to another.

Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 37 Fed. 567; *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. 465; *Little Rock & M. R. Co. v. St. Louis & S. W. R. Co.* 4 Inters. Com. Rep. 854, 26 L. R. A. 192, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775.

Just what the seventh section may have been intended to ac-

comply is not certain. Possibly the legislature had in mind that railways might attempt to relieve themselves from its provisions by interrupting traffic at State lines, and thereby deprive it of the character of interstate business. The seventh section may have been intended to prevent this. At any rate we are clear that it adds nothing to the third section in support of this claim of the complainant, and conclude that the Act to regulate commerce does not confer upon this Commission authority to make an order affirmatively requiring a railway carrier to deliver carloads of interstate freight to a connecting carrier. This Commission has more than once called the attention of Congress to this state of the law. Second Annual Rep. p. 70 and nearly every report since.

III.

It appears from the findings of fact that all railways entering Louisville interchange carloads of dead freight to be switched to various points within the switching limits of Louisville, and it seems that Central Stock Yards is within those switching limits. The Louisville & Nashville would deliver to the Southern cars loaded with every species of freight, except live stock, to be switched by it to Central Stock Yards. The complainant insists that its refusal to deliver live stock as well is a discrimination under the third section against that particular species of traffic, and that this Commission, even though without general power to order an interchange of cars between railway companies, may compel this defendant to treat live stock in the same way that it does dead freight.

This question, in much the same form, was presented in *Butchers' & D. Stock-Yards Co. v. Louisville & N. R. Co. supra*. There the railroad company maintained a side-track nearly one mile in length along Front street, with which various establishments were connected by switch; and it appeared that a switching connection was granted to everybody who applied, so long as the commodities to be moved were dead freight. The Butchers' & Drovers' Company demanded a connection by switch for the movement of live stock. In disposing of the case, Judge Taft stated that one controlling point was the inquiry whether this discrimina-

10 I. C. C. REP.

tion in favor of dead freight and against live stock was justifiable. He held that it was, putting the decision on the ground that the character of the service in the transportation of live stock differed so materially in fact from the transportation of dead freight that a refusal to treat both commodities alike did not constitute an actionable discrimination. We have already remarked that there is a wide difference between switching carloads of live stock to and from every side-track, which may be requested upon the line of a railroad, and the delivery of similar cars to its connections in regular course of business. But it must be remembered that the service rendered by these railroads in Louisville to dead freight is essentially a switching service. It does not appear under what terms loaded cars are thus taken to destination, who is responsible for the delivery, or who makes collection of the freight money. It is conceivable that the defendant might be willing to deliver its carloads of dead freight to be thus switched to destination when it would properly refuse to deliver its live stock. We think the facts are so far similar that the Butchers' & Drovers' case must be regarded as controlling the one before us, and feel constrained to hold, upon its authority, that the defendant is not guilty of unjust discrimination in delivering dead freight and refusing to deliver live stock to the Southern Railway.

There is a still further consideration. A discrimination under the third section to be undue must ordinarily be such that the prejudice arising out of it against one party is a source of advantage to the other. That can hardly be said of this discrimination. To refuse to make deliveries of live stock is a hardship upon that species of traffic; to make deliveries of dead freight is a benefit to that species of traffic, but the refusal to switch live stock does not in the case before us in any respect benefit dead freight. If we were to find an undue discrimination and were to order defendants to cease from its continuance, that order might be complied with either by delivering live stock or by ceasing to deliver dead freight. In case the latter alternative were adopted, the interests for which the complainant stands would be in no respect benefited, while those persons who now do benefit from the pres-

ent deliveries might be greatly damaged. It does not appear, and there are no means of determining, which alternative the defendant would adopt if put to the choice, and we should hesitate, under those circumstances, to make an order which might result, not in advantage to live stock shippers, but in detriment to all shippers of dead freight. What is here said applies only to a prejudice or disadvantage growing out of discrimination between commodities. Traffic may perhaps be subjected to undue disadvantage under the third section by imposing upon it unjust burdens or refusing to it privileges to which it is lawfully entitled.

IV.

The complainant insists that the provisions of the Kentucky Constitution, set forth in the findings of fact, were adopted in aid of interstate commerce, and should be so treated in disposing of this case. Without attempting to determine whether these provisions, if enforced as to the traffic under consideration, are sufficient to compel the defendant to make deliveries as requested, and without inquiring whether the State of Kentucky can regulate the switching of this interstate traffic, we are of the opinion that this Commission has no jurisdiction to enforce those provisions. We deal entirely with the Act to regulate commerce, and have no authority beyond that conferred by the terms of such Act.

About the time of the filing of the petition in this case the Central Stock Yards Company began suit in the Federal Court with a view to accomplishing the same purpose aimed at in this proceeding. That case, at the time of the submission of this one to the Commission, had been decided against the plaintiff; *Central Stock Yards Co. v. Louisville & N. R. Co.* 112 Fed. 823, and an appeal was pending before the Circuit Court of Appeals. This opinion was prepared soon after the submission of the case but has been held at the request of the petitioner to await the final disposition of the above suit in the courts in the view that the conclusions there reached might indicate some ground on which the Commission could act. That case has recently, February 23, 1904, been decided by the Supreme Court of the 10 I. C. C. REP.

United States upon appeal from the decision of the Circuit Court of Appeals. So far as we can see, neither the opinion of the Circuit Court of Appeals, nor that of the Supreme Court, warrants a different result from that arrived at by us; indeed, those opinions appear to be direct authority for the conclusions reached by the Commission. *Central Stock Yards Co. v. Louisville & N. R. Co.* 55 C. C. A. 63, 118 Fed. 113; Adv. S. U. S. 1904, p. 339, 24 Sup. Ct. Rep. 339.

The petition must therefore be dismissed.

10 I. C. C. REP.

No. 681.

THE CENTRAL YELLOW PINE ASSOCIATION
v.
THE VICKSBURG, SHREVEPORT & PACIFIC RAIL-
ROAD COMPANY *et al.*

Decided March 19, 1904.

1. The third section of the Act to regulate commerce, which prohibits undue preference between individuals or localities, is not violated by defendants in the granting of divisions in rates to lumber mills owning or controlling short originating roads called "tap lines," while other carriers fail or refuse to allow like concessions to members of the complaining Association located in a different section of country.
2. The second section of the Act to regulate commerce, which prohibits a rebate or other concession in rate whereby one shipper is preferred to another, refers to a like and contemporaneous service performed under similar circumstances and conditions, and it is not shown in this case that lumber mills served by defendants are so located that differences in divisions allowed by defendants to tap lines used for such mills, or the failure of one of the defendants to allow any division to some mills, violates this section.
3. Whether divisions or allowances from published tariff rates made by defendants to tap lines owned or controlled by lumber mills constitute departures from such published rates in violation of the Act to regulate commerce or of that Act as amended February 19, 1903, is the question herein presented, and while complainant has no direct interest in the determination of that question it has such an indirect interest as entitles it under the statute to maintain this proceeding.
4. Defendants publish a certain rate on lumber from stations upon their lines which must be strictly observed and charged to all shippers alike, and they are not entitled, under the Act to regulate commerce, to grant a division of the rate to the owner of a lumber mill as compensation to him for the cost of bringing his logs to the mill by steam railroad, horse railroad, wagon, or any other means of conveyance.
5. Under the Act to regulate commerce a common carrier subject to its provisions can allow a division of rates only to another common carrier which, participating in the particular traffic to which the rate is applied, is also subject to the Act to regulate commerce. The two lines

may by contract or agreement establish a joint rate from the point of origin on the one road to the point of destination on the other and agree between themselves as to divisions of the rate.

6. The transportation of the log to the mill by one line and the transportation of the lumber from the mill by another line may, under the circumstances of this case, be treated as in the nature of a through shipment from the point where the log is received to the point where the lumber is finally delivered, and the carrier of the lumber may by joint arrangement with the log carrier make such allowance towards the cost of moving the log as would be fairly involved in moving the lumber from the point where the log is received for carriage, provided always that the carrier of the log is a common carrier by rail; but this holding extends the application of the principle of milling in transit to the extreme limit.
7. Treating the transportation first of the log and then of the lumber as a through shipment involves the right to mill in transit, and when that privilege is granted the tariff should show upon its face that the transportation covers carriage of the log to and the lumber from the mill, and the division allowed to the "tap line," or carrier of the log should be named in all cases.

T. E. Miller and Green & Green for complainant.

S. H. West for St. Louis Southwestern Railway Company.

Martin L. Clardy for St. Louis, Iron Mountain & Southern Railway Company.

S. W. Moore for Kansas City Southern Railway Company.

H. H. Hall for Vicksburg, Shreveport & Pacific Railroad Company.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, Commissioner:

The complainant is a voluntary association composed of individuals, firms and corporations engaged in manufacturing and handling yellow pine lumber in Mississippi and Alabama. It is said to represent about one-half the entire output of those states, and it was organized for the purpose of correcting unreasonable and discriminating freight rates.

The complaint was originally brought against the Vicksburg, Shreveport & Pacific Railroad Company, the St. Louis Southwestern Railway Company, the St. Louis, Iron Mountain &

Southern Railway Company and the Kansas City Southern Railway Company. After testimony had been taken and before the final submission of the case, the complaint was, at the request of the complainant, dismissed as to the Vicksburg, Shreveport & Pacific Company, leaving the last three railways above named as defendants.

Large quantities of yellow pine lumber are manufactured in the states of Arkansas, Louisiana and Texas. This lumber is similar to that produced in Mississippi and Alabama and competes with it in northern markets. The territory mainly referred to in this proceeding is what is known as Central Freight Association territory, being, roughly speaking, the section lying north of the Ohio River and between the Mississippi upon the west and a line running through Buffalo and Pittsburg upon the east. As we learn from the testimony in this case, and also from that taken in other cases recently heard by the Commission, rates from both sides of the Mississippi River into this territory upon yellow pine lumber are the same. This relation was established after much competition and long controversy, for the purpose of admitting lumber from both sections upon terms of equality. Rates from all this southern territory into Central Freight Association territory are constructed upon the blanket system, being the same from all points of production to any given destination.

The method of manufacturing and marketing this lumber is essentially identical in all parts of the south. Mills are at first constructed upon the lines of railway traversing that territory and the logs are hauled into these mills from the forests. As the timber is cut off, however, and the haul becomes longer, it is necessary to provide some other means for bringing the logs to the mill. If the mill happens to be situated upon a stream they are sometimes floated down, but ordinarily a railroad is built into the timber and the logs are transported by this means. These logging roads are usually of the standard gauge, although not invariably, and are constructed and operated as are the main line railroads of this country, the power being furnished by locomotives and the logs loaded upon flat cars. In process of time the logging road increases in length until it frequently reaches 10 I. C. C. REP.

50 or 60 miles. The cost of constructing these roads is from \$6,000 to \$8,000 per mile.

As already indicated the use of this appliance for bringing logs to the mill is almost universal with large plants. There are few mill operations of any extent upon the east or the west of the Mississippi River which do not embrace as a part of the necessary outfit a logging road of this character. Now the complaint alleges that while, in territory occupied by members of the complainant association, nothing is allowed by the carriers which finally transport the lumber to market for the service of these logging roads in bringing the logs to the mill, an allowance is made by the defendants in this suit to such roads upon their lines of from 1 to 5 cents per hundred pounds; that this allowance is unlawful; and that mill owners upon the defendant lines who own these logging roads, instead of paying the same rate as do the members of the complainant association into Central Freight Association territory, in reality pay a rate less by the amount of these divisions.

The three defendants were each required to furnish certain information with respect to the logging roads along their respective lines to which these divisions were allowed, and the following facts are compiled from these statements and from the testimony of the traffic officials of the defendants.

Kansas City Southern. The number of tap lines connecting with this defendant is 16. The length of these lines is from 6 to 64 miles. Eleven are standard and 5 narrow gauge. The equipment ranges from 1 locomotive to 8 and from 13 to 350 cars; the average number of engines being about 4, and of cars 40. Eight of these are operated by chartered railway companies; the others by private individuals, firms or corporations.

With two exceptions the mills are situated upon the line of the defendant at the junction point, so that the only service performed by the tap line is the transportation of the logs to the mill. Joint tariffs are filed by the Kansas City Southern Company with these lines, it being authorized by them to act as their agent in that behalf. The billing of the lumber is from the junction point and is by the agent of the Kansas City Southern and apparently in the name of that company. As we understand the

10 I. C. C. REP.

testimony there would be no difference upon the face of the billing between a case where the lumber was shipped by a mill provided with a logging road to which a division was allowed and that of a mill located at the same point which had no logging road and which, therefore, received no division.

The divisions allowed by this defendant seem to be the same to all tap lines, but differ with the destination of the lumber; thus, no division is allowed upon shipments to Cairo, a division of 3 cents per hundred is given upon shipments to Kansas City, and 2 cents per hundred when the destination is in the state of Kansas. The full tariff rate is paid upon the lumber from the junction point to destination either by consignor or consignee. Settlements of these divisions are made monthly, uniformly with the railroad company and never with the owner of the mill as such. No through rates obtain between tap lines proper and the Kansas City Southern on any commodity except lumber. All other articles pay the full local rate over the Kansas City Southern to or from the junction point, the tap line receiving its local rate also.

The St. Louis Southwestern. The number of tap lines connecting with this defendant is 21, of which 5 are chartered. Excluding the Louisiana & Arkansas, which seems to have developed into a railroad proper, their length is from 9 to 35 miles. Five are narrow, the remainder standard, gauge. The locomotives number from 1 to 4, cars from 3 to 66. The lumber mills are in all cases located at the junction points, the testimony showing that the managers of the defendant railway had insisted upon this. Through tariffs are published between these various tap lines and the defendant. The billing is in all cases from the junction point by the defendant and the full rate is paid by the mill. The divisions seem to be the same to all tap lines, but like those of the Kansas City Southern vary with the destination of the lumber, ranging from 1 to 2½ cents per hundred. Settlements are made monthly in all cases with the tap line company. All other commodities except lumber pay the full local rate to and from the junction point over both the tap line and the St. Louis Southwestern.

St. Louis, Iron Mountain & Southern. The tap lines connect
10 I. C. C. REP.

necting with this defendant are 41 in number, 19 being operated under railway charter. Their length varies from 6 to 100 miles, most of them being from 20 to 40 miles long. Their equipment consists usually of from 2 to 3 locomotives and of from 3 to 40 cars.

In most cases the mills are situated at or near the junction points. The theory and practice of this line in the filing of its tariffs and the billing of this lumber seems to be entirely different from that of the two defendants already referred to. Joint tariffs are filed by the tap lines and this defendant naming a through rate upon lumber from designated points upon the tap line, which is usually but not always the same as from the junction point. The billing is in all cases by the tap line and is from a point on the tap line to destination. In point of fact, the lumber is shipped from the mill at the junction point, the point upon the tap line named in the billing being that point at which the logs are originally taken up for transportation to the mill. The claim of this defendant is that the log is milled in transit, and that when the lumber finally goes forward it may with propriety be treated as though it were shipped from the point where the log originally started by rail. The Iron Mountain Company has no knowledge and makes no account of the transportation of these logs to the mill. Whenever the lumber is ready for shipment it receives the same from its tap line connection under the billing already described, and allows it a division which would be fairly compensatory if the lumber had in fact been taken up at the point named in the bill of lading. Usually this point is simply a lumber camp upon the tap line where the logs are brought to the railroad and loaded upon the cars.

The divisions allowed by this company vary apparently not with the destination of the lumber but with the conditions surrounding each tap line, and they run from 1 cent to 7 cents per hundred. Settlement for these divisions is made monthly with the tap line companies. This defendant has joint tariffs naming through rates with at least some of these tap lines upon other commodities than lumber.

Certain facts are generally true of all these tap lines.

They are at first built and owned by the proprietor of the

10 I. C. C. REP.

lumber mill. If the railway company is chartered the stock is taken either by the mill company or by persons in its interest. If there is no charter, the ownership of the mill and the railway appears to be substantially identical, although the tap line is always operated under a different name and as a separate department.

While these logging roads are almost or quite without exception mill propositions at the outset, built exclusively for the purpose of transporting logs to the mill, they soon reach a point where they engage in other business to a greater or less extent. As the length of the road increases, as the lumber is taken off and other operations obtain a foothold along the line, various commodities besides lumber are transported, and this business gradually develops until in several cases what was at first a logging road pure and simple has become a common carrier of miscellaneous freight and passengers. Almost all these lines, even where they are run as private enterprises, do more or less outside transportation, and it would be difficult to draw any line of demarkation between the logging road as such and the logging road which has become a general carrier of freight.

It is evident that these divisions are of considerable importance to the persons who enjoy them. A thousand feet of yellow pine lumber as it comes from the saw weighs approximately 4,500 pounds. This lumber is frequently dried and dressed before being shipped to market and in this state weighs considerably less. Testimony taken in other cases indicates that an average weight of all this lumber would not be far from 3,300 pounds to the thousand feet. Upon this basis a division of 3 cents per hundred pounds would be equivalent to about \$1 per thousand feet; and when it is remembered that these lumber plants produce from 35 million to 100 million feet per year it will be seen that these divisions, although not great as applied to a single 100 pounds, aggregate a very considerable sum. One manufacturer testified that his divisions amounted to approximately \$50,000 annually.

This practice of granting tap line divisions has been one of gradual growth, having been first initiated some 12 or 15 years ago. It seems to be universal upon the lines of the defendants,
10 I. C. C. REP.

and it was said that other lines of railway operating west of the Mississippi River grant similar divisions. It also appeared that such divisions had been granted in the past by certain lines in Mississippi and Alabama and that such divisions were to some extent allowed now by at least one railway in that section. The testimony showed that lands had been bought and mills established upon the understanding that such a division would be allowed. It was also said that this custom had become a recognized factor in the development of the lumber industry throughout the region in which it prevailed, and that values and other business conditions had become adjusted to it.

The division allowed does not seem to be in any case as great as the actual expense of transporting the logs to the mill. Without going into the matter in detail, it appears probable that in most cases these divisions amount to from 40 to 70 per cent of the cost of maintaining these tap lines including interest on the investment. It requires about four carloads of logs to produce one of lumber, and the expense of transporting the logs to the mill is, therefore, considerably greater than would be the cost of carrying the lumber if that were manufactured at the point where the log is taken up. It hardly seems, however, that most of these divisions could be regarded as excessive if the mill were located in the forest and the tap line treated as the initial road in transporting the lumber from there to destination.

Some testimony was introduced tending to show that mills west of the Mississippi River sold more than their due proportion of lumber in Central Freight Association territory owing to the advantage derived from this tap line division. In the view taken of the case this circumstance is immaterial.

It was claimed by the defendants that certain members of the complainant association enjoyed tap line divisions, and that certain other members had trackage rights which were more than equivalent to such divisions. This also seems to be immaterial and no finding is made upon that point.

CONCLUSIONS.

It is important to have in mind the exact question presented
10 I. C. C. REP.

upon these facts for decision. The third section of the Act to regulate commerce prohibits undue discrimination between individuals or localities. These divisions are an important item to the mill owners receiving them, and it is plain that were they allowed by these defendants to one individual and refused to another, or in one locality and not in another, a serious discrimination might thereby arise which would be in violation of the third section, unless justified by circumstances and conditions. It is equally plain that no such question is presented by this record. These complaining mills are all operated in territory east of the Mississippi River and their complaint has reference to lumber sold in Central Freight Association territory. The defendants are all located west of the Mississippi River and do not participate at all in the transportation of lumber from the mills of the complainants into the territory involved. There is no complaint here of discrimination between individuals or localities west of the Mississippi. Inasmuch, therefore, as the defendants do not make or participate in the rates which the complaining mills pay, nor control those rates, it cannot be said that they discriminate against them. While these divisions may and do work to the prejudice of the complainant's members, they are not for that reason unlawful. It was said in testimony and in argument, and it is evident, that if the mills of the complainant association enjoyed these tap line divisions they would rest under no disadvantage as compared with mills west of the Mississippi; yet the legality of this practice by the defendants would be in no respect affected if lines east of the Mississippi were to adopt a similar practice. It was also said that the granting of these divisions was equivalent to a reduction in the rate; but if lines west of the Mississippi should substitute for these divisions a uniform reduction of 2 cents per hundred pounds to Central Freight Association territory, which lines east of the river declined to meet, that reduction would not be unlawful although it would injure the complainants to an even greater extent than the present divisions. If this practice, therefore, be in violation of the Interstate Commerce Act it is not because it discriminates against the complainant or the territory in which its members operate.

The second section prohibits the payment of any rebate or the
10 I. C. C. REP.

granting of any concession by which one shipper is preferred to another. This refers to the performance of a like and contemporaneous service under similar circumstances and conditions. It has been held by the courts under the original Act, that to make out a violation of this section it was not enough to show a mere departure from the published rate; it must further appear that some other shipper had been actually charged and paid a higher rate than was exacted from the favored shipper. While the facts in this case show that all mills are not accorded the same division, and that upon at least one of the defendant railroads there are some mills which receive no division, it does not definitely appear that these mills are so located that the granting of a division would result in a violation of the second section as above interpreted.

The provision of the act, if any, which is violated in this case, would seem to be the requirement that carriers shall publish their rates and adhere to such rates when published. This was apparently the law under the sixth section of the original Act. It certainly is, according to the amendment approved February 19, 1903. This amendment, commonly known as the Elkins Law, makes failure upon the part of common carriers subject to the Act to file and publish their rates for the transportation of freight, and to strictly observe those tariffs, a misdemeanor punishable by heavy penalty. Under this act it is unlawful "to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier." The tariffs of these defendants name a certain rate for the transportation of lumber from the points at which are located the mills upon the lines of these defendants. The complainant insists that these divisions are in effect a concession from this published rate, and this is apparently the question for our decision. While the complainant has no direct interest in the determination of that question, it has apparently such an indirect interest as entitles it

under the provisions of the Interstate Commerce Act to maintain this complaint.

It appears that the payment of these divisions is in all cases made to a so-called railway company and not to the mill company. In some instances this railway company is merely a department of the mill company; in other cases it appears to be a separate firm composed of the same individuals; in still other cases it is a chartered corporation whose stock is owned by the mill company or the proprietors of that company; whatever money is received by it inures to the benefit of the mill company finally if not directly. In the discussion of this case we treat the two as identical, although there are perhaps instances in which this is not true. The substance of this transaction cannot be altered by merely changing the name of the party to whom payment is made. Such an arrangement would be a transparent "device" for securing the illegal concession.

Two of these defendants rest their justification for the granting of these divisions upon the ground that the railway may properly compensate the mill owner for the actual cost of bringing his logs to the mill by the allowance of this reduction in the rate at which the product of those logs goes forward to market, this being a proper means to adopt for the development of its traffic. The position of these defendants may be most clearly stated by assuming a concrete illustration. A is the owner of a large tract of timber land situated 20 miles from the main line of the Kansas City Southern Railway. He approaches the traffic manager of that company stating that he is anxious to convert this timber into lumber and send it to market over that line of railway, but that under present conditions he cannot be to the expense of transporting those logs to his mill, which is located upon the line of the Kansas City Southern; if, however, that company will bear some portion of the expense of bringing these logs to the mill he will undertake to cut out this block of timber. Now the attorney for the Kansas City Southern insists that the traffic manager of that road may properly make an allowance for this purpose, so long as it does not exceed the actual cost of the service; that very likely in the exercise of good judgment he ought to, since he thereby secures for his line traffic which would

10 I. C. C. REP.

not otherwise pass over it; and that, incidentally, the mill owner and the entire public, as well as the railway, are benefited by the arrangement, since this timber, not otherwise accessible, is thereby brought into market.

It should be carefully noticed that upon this theory the agency employed in bringing the logs to the mill is not of the slightest consequence. The claim is that the Kansas City Southern may properly allow this mill a reduced rate upon its product which shall compensate it for the cost of bringing those logs from the forest. It can make no difference what means are employed for that purpose; whether it be a railroad with an iron rail upon which the tractive power is a steam locomotive, or a tram road with a wood rail and mules for motive power; whether the logs be drawn by team or floated to the mill by water. If the right exists to make a lower rate upon the product as a method of compensating the mill owner for the expense of bringing the logs to his mill it must be immaterial how they are brought there.

Nor can the application of this idea be limited to a lumber mill. It may extend to every kind of a producing plant. The carrier may allow a concession upon the product of an iron furnace because the ore or the coke employed at that furnace costs more than similar articles used at another furnace from which the published rate is the same. It may make a similar concession upon the product of a cotton mill because it is operated by steam as against the product of another mill upon its line which is operating by water power. Once introduce the principle that a reduction may be made from the published rate which equalizes to different industries the cost of production and there is no stopping place.

We are confident that under the provisions of the Act to regulate commerce no such principle can be applied to the production of this lumber. The defendants publish a certain rate upon lumber from stations upon their lines. That rate they must observe to all shippers alike. They have no right to return a portion of that rate because logs out of which that lumber is manufactured have come there by a steam railroad or a horse railroad, by wagon or other means of conveyance.

The defendants rely upon *Interstate Commerce Commission*
10 I. C. C. REP.

v. *Detroit, G. H. & M. R. Co.* 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. Rep. 986, ordinarily known as the *Cartage Case*. It is urged that this case decides that a railway company may collect and deliver freight without imposing any charge for that service beyond the published rate from its station, and that if the company may properly perform this service it may clearly make an allowance to the shipper who performs it himself.

Assuming that this case holds all the defendants claim, its application is not apparent. The proposition before us is not in the nature of a cartage allowance. The defendants in the granting of these tap-line divisions do not undertake to collect this freight; they undertake simply to bear in certain cases a portion of the expense of transporting the logs of which this lumber is manufactured to the mill. Again it is by no means certain that, if a common carrier undertakes to make deliveries or collections of freight at a particular locality, it may allow the shipper a reduction of the published rate in consideration that the shipper performs himself the service of bringing the freight to or taking it from the depot. To allow such a practice would open the door to much fraud and discrimination.

The *Cartage Case* does not, however, go to the length claimed by the defendants. The point at issue in that case was this: Grand Rapids was situated some thirty miles beyond Ionia upon the line of the defendant railway company. The published tariff from eastern destinations was the same to both these cities, but the defendant at Grand Rapids, owing to the location of its station, was obliged to make and did make delivery to consignees, while at Ionia delivery was made at the station. Ionia complained that this was a violation of the Act to regulate commerce; and the Commission sustained the complaint and ordered the defendant to desist. This suit was to enforce the order of the Commission.

Upon the hearing before the Supreme Court of the United States it was admitted by counsel for the Commission that the only section violated was the fourth, the long and short haul provision, and the court expressly stated in its opinion that this was the only question considered. The conclusion was reached that the practice in question did not violate that provision for the 10 I. C. C. REP.

reason, apparently, that when the freight was delivered at the station it had reached the end of its journey so far as the fourth section of the Act to regulate commerce was concerned. The exact language of the court upon this point is here given.

“We agree with the Circuit Court of Appeals in thinking that the fourth section of the Interstate Commerce Act has in view only the transportation of passengers and property by rail, and that, when the passengers and property reached and were discharged from the cars at the company’s warehouse or station at Grand Rapids, for the same charges as those received for similar services at Ionia, the duties and obligations cast upon this company by the fourth section were fulfilled and satisfied. The subsequent history of the passengers and property, whether carried to their places of abode and of business by their own vehicles or by those furnished by the railway company, would not concern the Interstate Commerce Commission.”

The court did not hold that a railway company might or might not properly perform a cartage service, still less that it might not violate sections two and three of the Act by performing that service.

Wight v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822, when taken in connection with the language above quoted, would seem to be decisive against the contention of the defendants. Bruening and Wolf were both dealers in beer in the city of Pittsburg, and both purchased beer in Cincinnati. Bruening had a storehouse located upon the tracks of the Pennsylvania lines, while the storehouse of Wolf was not located upon any line of railway. The rate on beer from Cincinnati to Pittsburg was the same by both the Pennsylvania and the Baltimore & Ohio lines, 15 cents per hundred pounds. If Bruening shipped by the Pennsylvania he could lay down his beer in his storehouse at a total transportation cost of 15 cents per hundred, while if he shipped by the Baltimore & Ohio he must incur the additional expense of hauling his beer from the station of that company to his storehouse. In order to equalize these condi-

tions and thereby obtain the business of Bruening for the Baltimore & Ohio, Wight, the traffic manager of that company, agreed to deliver his beer at his storehouse. Subsequently, it having been ascertained that the actual cost of making such delivery was $3\frac{1}{2}$ cents per hundred, Wight agreed to pay Bruening this sum in consideration that he should perform the service of drayage himself. Bruening was accustomed to pay the full rate upon his beer when he received it; at the end of each month he rendered to the railway company his bill for cartage which was allowed and paid in due course. During this time Wolf paid the tariff rate of 15 cents per hundred and received his beer at the station of the Baltimore & Ohio. Wight claimed that upon these facts the circumstances and conditions surrounding the transportation of the beer of Bruening were different from those attending that of Wolf; that in view of these differing conditions he might pay Bruening for the cartage of his beer, since otherwise he could not hope to obtain that traffic. Under this arrangement, it was urged, Bruening obtained transportation for his beer at no less than he could have carried it over the Pennsylvania, and Wolf paid no more than he must have paid by either line. The court held, however, that it was in effect a rebate and, therefore, a violation of the second section. The language of the court is so applicable to the contention of the defendants upon the facts before us that we quote at length from the opinion.

“We are unable to concur in this view. Whatever the Baltimore & Ohio Company might lawfully do to draw business from a competing line, whatever inducements it might offer to the customers of that competing line to induce them to change their carrier, is not a question involved in this case. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another. Counsel insist that the purpose of the section was not to prohibit a carrier from rendering more service to one shipper than to another for the same

charge, but only that for the same service the charge should be equal, and that the effect of this arrangement was simply the rendering to Mr. Bruening of a little greater service for the fifteen cents than it did to Mr. Wolf. They say that the section contains no prohibition of extra service or extra privileges to one shipper over that rendered to another. They ask whether if one shipper has a siding connection with the road of a carrier it cannot run the cars containing such shipper's freight on to that siding and thus to his warehouse at the same rate that it runs cars to its own depot, and there delivers goods to other shippers who are not so fortunate in the matter of sidings. But the service performed in transporting from Cincinnati to the depot at Pittsburg was precisely alike for each. The one shipper paid fifteen cents a hundred; the other, in fact, but eleven and a half cents. It is true he formally paid fifteen cents, but he received a rebate of three and a half cents, and regard must always be had to the substance, and not to the form. Indeed, the section itself forbids the carrier 'directly or indirectly by any special rate, rebate, drawback, or other device' to charge, demand, collect, or receive from any person or persons a greater or less compensation, etc. And section 6 of the act, as amended in 1889, throws light upon the intent of the statute, for it requires the common carrier in publishing schedules to 'state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges.' It was the purpose of the section to enforce equality between shippers and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor."

If the Baltimore & Ohio in order to secure the business of Mr. Bruening, which it could get in no other way, might not lawfully allow a reasonable sum for cartage from the station to his storehouse, can these defendants pay, by giving up a portion of the

rate, the expense of bringing logs to mill in order to foster that particular industry and thus obtain traffic not otherwise obtainable? If it was a rebate to allow this beer dealer at the end of each month the actual cost of carting his beer, is it not equally a rebate to allow these mill men a specified part of the rate towards the actual expense of bringing in their logs?

The defendants also rely upon *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* L. R. 11 App. Cas. 97, in which it is claimed that provisions of the English law similar to those of our own statute were construed in favor of the contention of the defendants. The Denaby Company and one Bannister were both shippers of coal from the South Yorkshire fields over the defendant's railway to Grimsby. This coal was used at Grimsby for both water shipment and land sale. Bannister had coal yards at that point and his coal, when intended for land sale, was switched directly to these yards. The coal of the Denaby Company, when intended for land sale, was delivered upon the team tracks of the railway company at Grimsby. The court found that the railway company incurred greater expense in making delivery upon its tracks for the Denaby Company than it did in case of Bannister. The railway company allowed Bannister a rebate from the rate paid by the Denaby Company and shippers generally, and the court held that this was proper, since the cost of the service performed for him was actually less than that performed for the Denaby Company.

The railway also allowed Bannister a rebate upon coal for water shipment when it was delivered to the Hamburg American Line for the West Indies or shipped to certain destinations upon the coast of England; and this was done for the purpose of developing those markets which could not be reached at the going rate of freight. The court held, however, that this last rebate was illegal, since the railway company had no right to consider the disposition which was finally made of this coal.

This case decides that, under the English statute, where the cost of service is the same, the same rate must be charged irrespective of the source from which the traffic comes or the destination to which it goes. Now the cost of transporting this lumber, and every other incident attending its transportation, is 10 I. C. C. REP.—14.

exactly the same whether the logs out of which it was cut grew at the mill door or were brought there by rail. If the railway company could not inquire whether the coal of Bannister was intended for a particular market, neither can these defendants inquire the source of the rough material out of which the manufactured product has come. So far as this case can be treated as an authority, it seems to be entirely against the defendants.

We cannot agree with the defendants that they may, by allowing these divisions, compensate the mill owner for the cost of bringing his logs to the mill. Granting that they may do this in some other way, they cannot pay back a portion of the published rate for that purpose. Whatever tariff is established by them must be strictly observed. If these divisions are allowable at all it must be because of the relation existing between the railway which brings the logs and the defendant which transports the product to market. It is upon this ground that the St. Louis, Iron Mountain & Southern puts its defense. It asserts that the service of transportation is a through service at a through rate from the point at which the logs are taken up for transportation, the stopping to manufacture en route being an application of the familiar principle of milling in transit. This company, it will be remembered, publishes in all cases a joint rate from points upon the tap line, and the billing is in all cases made by the tap line ostensibly from the point where the logs are received by that line for transportation to the mill, although the lumber is in fact first put upon the cars for shipment in most cases at the junction point. Can the practice be sustained upon this theory?

It has been said that when this lumber is received by these defendants for transportation they have no right to inquire, for the purpose of determining what rate shall be applied, how that lumber has reached their lines. To this rule there is one important qualification. If the traffic has been brought by a railroad which is a common carrier under the Act to regulate commerce, the two lines may, by contract or arrangement, establish a joint rate from the point of origin to destination, and may agree between themselves as to the divisions of this rate. In such case the two lines are treated as one. The traffic with respect to the line of the defendant does not originate at the

point where it is received by it for shipment, and the rate actually applied to the movement of such traffic may differ from the published rate from that point. This principle is well understood; can its application be made to justify what is done by these defendants? For the purpose of answering that question we apply once more the concrete illustration which was used above in testing the first theory.

Rates throughout this southern lumber-producing territory are blanket rates, that is, they are the same from all points of production upon the various lines of railway to a given destination. Now when the traffic manager of the Kansas City Southern was approached and asked to extend his line to the tract of timber which Mr. A possessed, it is apparent that he might have elected to do so. That company might have constructed a branch line of the necessary length, might have located a station at the terminus where the mill stood, and might have applied the same rate on lumber from that station which obtained from other stations upon its line. Indeed it would have found some difficulty, in view of the system universally in vogue, in applying a higher rate from that mill than was made from all southern territory.

Let us assume that the management of the Kansas City Southern, not being able to provide the funds with which to construct this branch line, or not deeming it advisable to invest in this manner, says to Mr. A: We will not construct this branch road, but if you can find the parties who will our line will accord to such road, when constructed and in operation, a division of the through rate which shall be compensatory. If now, Mr. A can find the necessary individuals who are willing to build that railroad, and operate it as a railroad under the Act to regulate commerce, can there be any question that the same rate prevailing from stations upon the Kansas City Southern may be applied to his mill, and that the Kansas City Southern may allow to this branch line a reasonable division for the transportation of that lumber to its connection? Plainly not.

Once more. Mr. A finds it impossible to interest others in the construction of this railroad, and thereupon he takes the stock himself. The road is built and operated exactly as though

10 I. C. C. REP.

the ownership of it and the mill were independent, but in fact the same person owns the two. It seems clear to us that this fact can make no difference; that the mill of Mr. A may be accorded the same through rate that is accorded to a mill located at the junction point, and the branch road allowed a sufficient division to compensate it for transporting the lumber from the mill to the main line, provided that the rate is a joint rate between two common carriers.

Upon the argument counsel for the complainant virtually conceded that such would be the case, saying that where the tap line brought lumber to the main line instead of logs a division might properly be granted. This concession we think is somewhat broader than the law will warrant. It is not the fact that lumber and not logs has been transported to the junction point, nor that this lumber has been carried there by a railroad, which justifies the payment of the division; but rather the fact that the railroad which furnishes this service is a common carrier, and that the rate from the mill is a joint rate between these two carriers. If the railroad which carries the lumber to the mill from the junction point is a private carrier, we think the published rate from the junction point must be exacted and retained. The defendant in such case would have no more right to give up a part of that rate when the lumber was brought by rail than when brought by wagon.

These mills are usually located at the junction point and not upon the logging road. This is primarily due to the manner in which the development of the sawmill industry has proceeded; but there are also many reasons why, if the mill were to be located anew, it would be better to place it beside the main line rather than at the end of the branch line. We have seen that these defendants may properly allow a division for transporting the lumber from a mill upon the branch line to the main line. Can they, where the mill is at the junction point, allow a division when logs and not lumber are carried to the mill? If so, it must be upon the theory that when the lumber finally goes forward the rate may properly relate back to the point where the log was taken up for shipment. We are clear that one of these defendants may do upon a branch line constructed and operated

by it whatever it could do upon its main line, and that it might accomplish under a joint rate with an independent railway carrier whatever could be done upon its own branch line. The real question is, therefore, can a railway which receives logs at a point upon its line, and transports those logs to a sawmill where they are manufactured into lumber, treat the lumber as originating where the log did, and make such an allowance towards the transportation of the logs as would be a fair compensation for hauling the lumber from that point. In other words, can the principle of milling in transit be applied to the manufacture of logs into lumber?

It is well understood that at the present time this principle is applied to the movement of many commodities. Generally in its application the raw material pays the local rate into the point of manufacture; when afterwards the manufactured product goes forward it is transported upon a rate which would be applicable to that product had it originated in its manufactured state at the point where the raw material was received for transportation, whatever has been paid into the mill being accounted for in this final adjustment. Under this or some equivalent arrangement at the present time grain of all kinds is milled and otherwise treated in transit; flour is blended, cotton is compressed, lumber is dressed and perhaps otherwise manufactured; live stock is stopped off to test the market.

It may be urged with much force that the Act to regulate commerce does not sanction arrangements of this kind and the Commission early in its history intimated that such might finally be its conclusion. *Crews v. Richmond & D. R. Co.* 1 I. C. C. Rep. 401, 1 Inters. Com. Rep. 703. Such practices were, however, in use to a considerable extent at the time of the passage of the Act and since then they have become universal. To abrogate these privileges would be to confiscate thousands and probably millions of dollars in value by rendering worthless industrial plants which have been constructed upon the faith of their continuation. Nor is it a forced construction of the statute to hold that when the product finally goes forward to the point of consumption it but completes the journey upon which it entered when the raw material was taken up. There can be no

10 I. C. C. REP.

doubt that the application of this principle has cheapened the cost of transportation and probably of manufacture. The Commission finally held, in the *Matter of Unlawful Rates in the Transportation of Cotton*, 8 I. C. C. Rep. 121, that cotton might be compressed in transit; and no distinction can be made between this and most of the arrangements above referred to. Manifestly, however, there must be some limit to the application of this idea. Can the principle be applied to the case before us?

This Commission has often observed that no general rule can be laid down for the solution of these traffic problems. Whenever the question is one of fact each situation must be considered by itself. The conditions before us are somewhat peculiar. The practice which is attacked has grown up with the development of the lumber industry and seems on the whole to have been beneficial to the country in which it exists. Its effect is to bring into market lands not otherwise accessible, to decrease the cost and stimulate the production of lumber, thereby benefiting the entire public. It amounts to a reduction in the freight rate which we ought not to forbid without substantial reasons. Values have adjusted themselves to this situation. Lands have been purchased, mills located, large amounts of money invested upon the theory that the system would be continued. While the mill owner has no legal vested right of this sort which he can assert, there is a moral obligation resting upon the railway company to continue the practice, if it can do so legally. So far as can be seen the mill owner, the railway, the purchaser of lumber are all benefited. It seems plain to us that we ought not to interfere unless the positive mandate of the law requires it, and with considerable hesitation we conclude that it does not.

When these logs start for the mill it is certain, and may readily be a matter of agreement, that the entire product will go forward to destination. If the logs were shipped from a point upon the main line of one of these defendants to the mill at the local rate, we do not think that an adjustment of the rate in and of the rate out, when the lumber went forward, which would treat the lumber shipment as originating where the logs did would be illegal as a matter of law. To hold otherwise would simply

compel the moving of these mills to the vicinity of the timber, and this although entailing much expense would benefit nobody.

Once admitting the legality of the principle of milling in transit, whether it shall be extended to a particular case must depend largely upon the facts. Under all the circumstances disclosed by the record before us we think that this practice may be permitted here, but this holding extends the application of that principle to the extreme limit.

It appears that some, perhaps all of these defendants, now make what is known as a rough material rate upon logs from points upon their line to the mill. These tariffs specify that the low rate shall apply only in case the product is shipped out over the defendant line. Whether a carrier may apply a lower rate to the transportation of raw material to a given mill which ships the product out over its line than it applies for the same service to another mill, which disposes of the product otherwise, is not decided. What we hold is that the shipment of the log to the mill and the lumber from the mill may, under the circumstances of this case, be treated as in the nature of a through shipment from the point where the log is received to the point where the lumber is finally delivered, and that the carrier may make such allowance toward the cost of moving the log as would be fairly involved in moving the lumber from that point, and that it may do this by joint arrangement with the carrier bringing the log to the mill, provided that carrier is a common carrier by rail.

It will be noted that in our opinion these divisions can only be granted when the logging road is a public carrier which actually makes a joint through rate, and it was urged in argument that there can be no difference in effect between a common carrier which brings these logs to the mill and a private carrier which discharges the same service. It would be a sufficient answer to this that the law permits the allowance in one case and not in the other, but there is a practical answer as well. The common carrier is subject to public control, its tariffs must be filed according to law, it must report to governmental authority, it must obey the law obligatory on such carriers. These logging roads develop with the country, passing by almost imperceptible progress from carriers of logs to carriers of general merchandise and often of passengers. The same considerations which re-

10 I. C. C. REP.

quire that railroads in general should be subject to public supervision apply to these lines.

One further observation should be made. While the public as a rule has no concern in the division of through rates, and while the statute does not require the publication of the proportions into which such rates are divided among the carriers, we think these divisions stand somewhat different. The transportation first of the log and then of the lumber involves the exercise of the right to mill in transit. Where that privilege is granted to grain, cotton, or other commodities, the fact should be and usually is plainly stated upon the tariff, together with the conditions upon which the privilege will be allowed. In this case the only way of stating the value of that privilege to the mill owner is by giving the division which is allowed the tap line, since that division is in all cases, even if the road be a distinct and independent corporation, an allowance for the benefit of the mill. We think, therefore, that the tariffs should state upon their face that the transportation provided for covers the carriage of the log to the mill and the lumber from the mill, and that the division which is allowed the tap line should in all cases be named.

If the tariffs of the St. Louis, Iron Mountain & Southern were modified in accordance with the above suggestion, we think that company would be within the law, as it now conducts this business, in all cases where the branch line is in fact a common carrier. Whether a particular tap line is or is not a common carrier may evidently be a question of some difficulty, but it does not seem necessary to attempt to lay down any rules here upon that subject. To become a common carrier within the purview of this case the tap line must clearly file its tariffs and render its statistical report to the Commission.

According to the views here expressed, the divisions allowed by the Kansas City Southern and the St. Louis Southwestern, are in violation of law, and those granted by the St. Louis, Iron Mountain & Southern may be. An order in this case would not, however, be the most efficacious means of putting a stop to these illegal practices if continued; the more ready way would be a resort to injunction or criminal proceedings. This complaint will, therefore, be dismissed and such other steps will be taken as may seem necessary after due opportunity has been given the carriers to adjust their tariffs and other arrangements.

No. 607.

CHARLES M. CIST
v.
MICHIGAN CENTRAL RAILROAD COMPANY.

Decided April 1, 1904.

1. A passenger fare charged by defendant over its branch line from a point in Canada to a point in the United States amounting to about 3 cents per mile for a distance of 35.3 miles, and including a 6-cent bridge charge by an independent company, is not unreasonable upon the facts of this case.
2. When a railroad company makes a reduction from regular passenger fares which are not found unreasonable, it may lawfully require that a person desiring to avail himself of such reduction shall purchase a ticket, and that all persons not holding such special reduced rate ticket shall pay the reasonable ordinary fare.
3. While the regulating statute may be applied to the reasonableness of a rate from a point in Canada to a point in the United States, it is clear that no law of the United States can apply to a discrimination between places in a foreign country.

Charles M. Cist for complainant.

O. E. Butterfield for defendant.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, *Commissioner*:

Niagara-on-the-Lake is situated on the Canadian side of the Niagara River near the point where it empties into Lake Ontario. The defendant, a United States corporation, maintains a through passenger service from this point to Buffalo, New York. The route is by the railroad of the defendant from Niagara-on-the-Lake to Victoria, Canada, a distance of about 30 miles, thence across the International Bridge to Black Rock on the American side and from there to Buffalo over the tracks of

10 I. C. C. REP.

the New York Central 5 miles. The bridge is operated by an independent company which charges 6 cents for each passenger carried across it in the trains of the defendant. The entire distance from Niagara-on-the-Lake to Buffalo is 35.3 miles.

By the New York Central line it is 30 miles from Buffalo to Lewiston, which is situated upon the New York side of the Niagara River about 5 miles from Niagara-on-the-Lake. Steamers ply between Lewiston and Niagara-on-the-Lake, so that it is possible to reach Buffalo from the latter point over this route as well as by the line of the defendant. The New York Central is prohibited by law from charging more than 2 cents per mile passenger fare, and the boat fare between Lewiston and Niagara-on-the-Lake is 25 cents, making a total by this route of 85 cents.

The regular published schedule of the defendant from Niagara-on-the-Lake to Buffalo is \$1.10, but during the summer season it makes a special rate of 85 cents to meet competition. The station of the defendant at Niagara-on-the-Lake is situated upon, or near the steamboat wharf, but it also stops its train at Queen Street. To get the benefit of the special 85-cent rate it is necessary to purchase a ticket at the station; no rate less than its regular fare is charged on the train.

The complainant boarded the train at Queen Street without a ticket and was compelled to pay \$1.10 for transportation to Buffalo. He complains that this was illegal, first, because the charge of \$1.10 is unreasonably high, second, because the defendant while charging him that amount performed the same service for the other passengers for 85 cents.

We cannot find upon this record that \$1.10 is an unreasonable charge from Niagara-on-the-Lake to Buffalo. This is a branch line of the defendant and the case does not show density of traffic nor the circumstances under which the passenger service is performed. It simply appears that a rate of 3 cents per mile is imposed. While lower rates are in force in many parts of the United States it is also true that there is hardly any section of country in which a rate as high as 3 cents per mile is not charged for a local service of this distance. The fact that a rate of 85 cents is made during the summer season to meet competition via Lewiston is not controlling, nor is the further fact that the New

York Central under compulsion of law establishes a rate of 2 cents per mile from Lewiston to Buffalo. We do not find that this rate is reasonable; we simply fail to find that it is unreasonable, as there is no evidence in the record upon which an intelligent judgment can be formed. This is a most unsatisfactory disposition of the question, and if the case were of wider application, or the subject of more general complaint it might be our duty to proceed on our own motion to develop the necessary facts.

The case is meager of facts showing whether there is or ought to be a station of the defendant at Queen Street. It simply appears that there is no station building and no station agent at that point, but that the defendant stops all its trains there to discharge and receive passengers. It was said by counsel for the defendant that if there were a station at that point no ticket would be sold for Buffalo at less than \$1.10.

CONCLUSIONS.

Upon the above findings the first proposition of the complainant, that the rate which he was forced to pay was an unreasonable one, is not sustained.

The second proposition is that it was unjust to charge him \$1.10 while other passengers upon the train were carried for 85 cents. The regular rate from Niagara-on-the-Lake to Buffalo was \$1.10 and this was the amount collected of all persons who paid their fare to the conductor. Any person who saw fit to do so could purchase a special ticket during a certain portion of the year for 85 cents. We think that when a railroad company makes a reduction from its regular rates, which are not found unreasonable, it may require that the person desiring to avail himself of that reduction shall purchase a ticket and that it may collect of all persons not holding such special ticket the reasonable ordinary fare.

But the complainant urges that in this case he could not purchase this special ticket for the reason that the defendant did not have the same on sale at the point where he boarded the train. There was no way in which he, taking the train at that point, could have obtained transportation to Buffalo for less than the 10 I. C. C. REP.

amount which he actually paid. This presents the question, ought the defendant to have maintained a ticket office at Queen Street? and perhaps the further question, Might the defendant impose a higher charge from an intermediate point than from a more distant point for the same service? Of these matters we think this Commission has no jurisdiction. The discrimination, if there be one, is local and the locality is in Canada. Assuming that we have jurisdiction over the reasonableness of this through rate, it seems clear that no law of the United States can extend to a question of discrimination between places in a foreign country.

The complaint is dismissed.

10 I. C. C. REP.

No. 709.

E. D. HEWINS

v.

THE NEW YORK, NEW HAVEN & HARTFORD RAIL-
ROAD COMPANY.

Decided April 11, 1904.

Defendant has numerous through daily trains between New York and Boston on which the through parlor car fare is one dollar, on all trains *from* intermediate points the parlor car fare is 50 or 75 cents according to distance, and on three trains the parlor car rate is one dollar *to* any intermediate point. Complaint is made that the charge of one dollar to intermediate points constitutes unlawful discrimination. *Held*: 1. That it is not a violation of law to charge more in one direction on certain trains than is charged in another direction on all trains between the same points. 2. That defendant furnishes adequate parlor car accommodations at the lower rates for local and short-distance passengers, and the discrimination against such passengers by reason of the dollar rate to intermediate points on three of defendant's trains is not undue or unreasonable.

E. D. Hewins for complainant in person.

F. A. Farnham for defendant.

REPORT AND OPINION OF THE COMMISSION.

KNAPP, *Chairman*:

The unlawful discrimination alleged in this case is based upon the rates charged by defendant for parlor car seats on certain of its passenger trains, as hereinafter explained. The facts are
10 I. C. C. REP.

wholly undisputed and the question presented appears from the following statement:

The complainant is a dealer in cotton goods in the city of Boston, and in the course of his business has frequent occasion to travel upon defendant's road.

The defendant is a common carrier by railroad between New York and Boston and intermediate points. Passengers are carried over its lines in ordinary coaches and in parlor cars. The passenger traffic on this road is large and numerous trains are operated.

Between New York and New Haven all trains pass over the same line. Between New Haven and Boston there are two lines; one passing through New London and Providence, known as the Shore Line; and one passing through Hartford and Springfield, known as the Springfield Line. The Springfield Line is operated in connection with the Boston & Albany road between Springfield and Boston. The defendant operates its own parlor cars and fixes the rates for their use on its own lines. The parlor cars on the Springfield Line appear to be owned partly by defendant and partly by the Pullman Company, but the defendant admits responsibility, as we understand, for the parlor car rates on this line.

Between New York and Boston there are two limited trains daily, on which extra fare is charged for extra accommodations, and also certain trains carrying sleeping cars, about which no question is made in this proceeding.

Excluding these limited and sleeping car trains, there appear to be eleven trains or more out of New York carrying parlor cars to New Haven, of which ten go through to Boston by one line or the other. Going the other way there are ten trains carrying parlor cars through from Boston to New York and eleven carrying parlor cars from New Haven to New York.

On all these trains the through parlor car rate in either direction is one dollar; and on all of them the rate *from* intermediate points to either Boston or New York is 50 cents or 75 cents according to distance. On three trains the parlor car rate is one dollar *to* any intermediate point. These are the trains leaving New York and Boston at 12 o'clock M., and 4 o'clock P. M. by

10 I. C. C. REP.

the Springfield Line, and leaving both places at 3 o'clock P. M. by the Shore Line. When this complaint was filed, August 4, 1903, the dollar rate was charged to intermediate points on the Shore Line train leaving New York and Boston at 5 o'clock P. M., but the lower rates to intermediate points are now allowed on that train. On other trains carrying parlor cars, aside from the three just mentioned, the dollar rate is charged only for a through seat between New York and Boston, the charge to intermediate points being fifty cents or seventy-five cents according to distance. In other words, the parlor car rate *from* intermediate points to the terminals is never more than fifty cents or seventy-five cents, according to distance, while on the three trains in question the parlor car rate from the terminals *to* intermediate points is one dollar, the same as the through rate. This is the discrimination of which complaint is made.

Parlor cars were originally put in service to accommodate through or long-distance travel between Boston and New York by furnishing easier and more comfortable seats. At first there was little demand for parlor cars, but the business has developed to quite large proportions and there is now an extensive demand for such cars, especially by passengers traveling through between the terminals above named.

The defendant justifies the through rate of one dollar to intermediate points on the three trains mentioned by reason of the following facts: In the first place, the number of persons taking parlor cars to or from intermediate points is small in comparison with the total number of parlor car passengers. For example, the average number of local parlor car passengers on the train leaving New York at 3 P. M. is only about ten per cent of the whole number of passengers using parlor car accommodations on that train. Therefore, as the parlor cars are patronized chiefly by long-distance travelers and the parlor car service primarily maintained for their benefit, it is necessary on some trains to guard against filling up the parlor cars at the terminals with local or short-distance travelers, and thus leaving insufficient accommodations for through or long-distance passengers. It is said that all or nearly all the parlor car seats on these trains are frequently required for the use of through travelers,

10 I. C. C. REP.

and that such travelers would often be deprived of desired accommodations if seats were sold at lower rates to intermediate points. For this reason, the defendant says, the dollar rate is charged to intermediate points on four (now three) trains which are operated largely for through travel, and on which as a rule the entire parlor car space is needed for through passengers.

The further statement is made that it is not feasible to increase the parlor cars on the trains in question, because the number now used is as great as can be hauled at the high rate of speed maintained by those trains. Moreover, at both New York and Boston the yards where trains are made up are at considerable distances from the passenger stations, while the physical conditions at those stations are such that additional cars cannot be put in after the trains have been placed at the passenger platforms. As a practical matter, it is insisted, the trains must be made up with reference to their scheduled time and the usual number of passengers carried, and that an increase of parlor car accommodations cannot be provided. In other words, the dollar rate is charged on these trains to all points not for the purpose of added revenue but in the interest of through passengers who have the greatest need of parlor car accommodations. The evidence sustains defendant's contention in this regard and the facts are found accordingly.

We further find that the number of trains and parlor cars on which the lower parlor car rates to intermediate points are allowed, together with the hours at which such trains leave the respective terminals and arrive at intermediate stations, are reasonably sufficient for the accommodation of the public. Taking all the circumstances into account, including due provision for through passengers, it is not perceived that any real hardship or injustice results from the dollar charge to all points on the three trains in question.

The conclusion follows so plainly from the facts found in this case that argument is unnecessary. It is not a violation of law to charge more in one direction on certain trains than is charged in the other direction on all trains between the same points.

Macloon v. Boston & M. R. R. Co. et al. 9 I. C. C. Rep. 642.

10 I. C. C. REP.

Duncan v. Atchison, T. & S. F. Ry. Co. et al. 6 I. C. C. Rep. 85.

The defendant furnishes adequate parlor car accommodations at the lower rates for local and short-distance passengers, and the discrimination against such passengers by reason of the dollar rate to intermediate points on three of defendant's trains is not undue or unreasonable. In the interest of through passengers the defendant had the right to make the regulation in question. In the case of *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722, after discussing several cases called to its attention, the Supreme Court said:

"With no disposition whatever to vary or qualify the cases above cited, neither the conclusions of the court nor the tenor of the opinions are opposed to the principle we hold to in this case, that, after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic"

We are of the opinion that no violation of the Act has been shown and that the complaint should be dismissed.

10 I. C. C. REP.—15.

GLADE COAL COMPANY
v.
BALTIMORE & OHIO RAILROAD COMPANY.

Decided April 28, 1904.

1. Defendant's refusal to furnish cars to complainants between February 25 and March 26 on the Deal side-track at Meyersdale and the side-track of the Savage Fire Brick Company at Keystone Junction, while furnishing and offering to furnish cars to complainants' competitors at other points, under the circumstances disclosed by the evidence and described in the findings, was undue and unlawful discrimination against complainants, for which they are entitled to reparation.
2. Making certain charges for the transportation of coal shipped in carloads when the coal is loaded by tipple, and exacting a higher charge when it is loaded in some other way, *and for that reason*, is not justified by difference in cost to the carrier between different methods of loading, or by other facts appearing in this case, and renders the higher rates thus made unreasonable and unduly discriminatory, first, as against complainants, and, second, as against all other shippers of coal except those who load by tipple, and constitutes a violation of sections 1 and 3 of the Act to regulate commerce.

P. J. Farrell for the Commission.

Hugh L. Bond, John G. Wilson and Geo. Dobbins Penniman for defendant.

REPORT AND OPINION OF THE COMMISSION.

KNAPP, Chairman:

The complainants in this case charge that between January 8 and March 26, 1903, defendant discriminated against them in the matter of rates charged and facilities furnished for the transportation of coal in carloads from Meyersdale and Keystone Junction in the State of Pennsylvania to market points in other

10 I. C. C. REP.

States, in violation of section 3 of the Act to regulate commerce; they also allege that said rates are unreasonable and unjust, in violation of section 1 of said act, and ask reparation for the injury they claim to have suffered in the premises.

Defendant, in its answer, denies the alleged violations of law, and advances some new matter in explanation and justification of the actions complained of.

Facts deemed material to a determination of the questions involved are found as follows:

FINDINGS OF FACT.

On or about January 8, 1903, the complainants, W. H. Deal, C. E. Deal and E. J. Boyles, formed a partnership and began the business of mining, selling and shipping coal under the firm name of "Glade Coal Company," with headquarters at Meyersdale. They purchased one coal mine and leased another. For convenience, the former will be called the Glade City mine and the latter the Mosgrave mine. The Glade City mine is located adjacent to defendant's railroad and about midway between Meyersdale and Keystone Junction, while the Mosgrave mine is located a short distance westerly of Meyersdale. The distance from the Glade City mine to either Meyersdale or Keystone Junction is about one mile, perhaps a little more, and the distance from the Mosgrave mine to Meyersdale is about two miles.

Defendant is a common carrier of interstate traffic and furnishes the only transportation facilities enjoyed by the localities of Meyersdale and Keystone Junction.

From time to time between January 8 and March 26, 1903, complainants, wishing to make interstate shipments of coal in carloads from the shipping points last above mentioned, requested defendant to furnish cars therefor. During the month of January, 1903, complainants were able to obtain only 8 cars, which they loaded at Meyersdale. From that time until March 26, 1903, the date the complaint in this case was filed, defendant refused to furnish them any cars to load with coal at either Meyersdale or Keystone Junction, but offered to permit such loading at Sand Patch, Rockwood and Boynton, stations on defendant's railroad in the State of Pennsylvania.

Distances from complainants' coal mines to the three stations last above named range from 3 to 13 miles, and complainants could not, during any of the time in question, if obliged to load at such stations, secure a profit from their coal business. Consequently they did not take advantage of the opportunity afforded by defendant's offer.

Before making requests for cars as aforesaid, complainants obtained from the owners thereof permission to use two side-tracks connected with defendant's main line of road; one located at Keystone Junction and owned by the Savage Fire Brick Company, and the other located at Meyersdale and owned by said C. E. Deal; and it was upon these side-tracks that complainants requested defendant to deliver cars to them for the interstate shipments referred to.

Along the latter side-track and immediately adjacent thereto a platform and dump had been built, upon which complainants' coal was hauled in wagons and from which it was shoveled or dumped into the cars, the upper portion of the platform and dump being about on a level with the tops of the coal cars.

In the Glade City mine there are two seams of coal, separated from each other by a layer of clay about 6 or 8 inches thick. These two seams taken together make a thickness of clear coal ranging from 24 to 30 inches. There is only one seam of coal in the Mosgrave mine, the average thickness of which is about four feet. The mining of coal is somewhat more expensive at the Glade City mine, therefore, than at the Mosgrave mine.

Regarding the amount of coal that could have been taken out of the Glade City mine in a day of 9 or 10 hours, which according to the record is the length of time a coal miner was supposed to work each day, the testimony was very conflicting. Also, while some improvements were made soon after January 8 which increased the capacity of the mine, dates when the improvements were completed were not definitely shown. However, we think that by dividing the time in question into two periods fair averages can be stated, and after a careful examination and consideration of the record we find as follows: From January 8 to February 15, 1903, 33 working days, 9 men could have been worked; that is, 8 digging coal in the mine and shovel-

ing it into the mining cars, and 1 running the mining cars into and out of the mine and unloading them. Working in this way 9 men would have taken out of the mine 24 tons of coal per day, or in the 33 working days, 792 tons. From February 15 to March 26, 1903, 32 working days, 11 men could have been worked and 30 tons per day taken out of the mine, or in the 32 working days, which excludes February 22, 960 tons.

Previous to February 15, the expense of mining the coal, drawing it to Meyersdale or Keystone Junction and loading it into the cars, which includes depreciation of the mine, and incidentals, such as lumber used in the mine, would have been \$1.35 per ton, and after February 15 it would have been \$1.50 per ton.

During the 65 working days between January 8 and March 26, 1903, 3 men could have been worked in the Mosgrave mine and would have taken out of it 8 tons of coal per day, or in the 65 days, 520 tons.

This coal could have been mined, hauled to Meyersdale and loaded into the cars for \$2 per ton, which includes 8 cents per ton royalty that complainants agreed to pay to the owner of the mine.

These coal mines are located in what is known as the Meyersdale district, and the average loading of coal in that district during the time in question was 40 tons to the car. Therefore, the number of cars required by complainants, between January 8 and March 26, 1903, was 57.

There is a large number of coal mines in the Meyersdale district, many of which are quite extensive; and during the months of January, February and March, 1903, coal cars in that district were unusually scarce. This condition was brought about by circumstances over which defendant had no control. The strike of employees in the Anthracite coal fields of Pennsylvania was one, and perhaps the most potent one, of these circumstances.

During winter months it often happens that carriers do not have a sufficient number of coal cars to meet all requirements of shippers. Under these circumstances, unless great care is exercised in the matter of distribution, some shippers are liable to be

10 I. C. C. REP.

unduly prejudiced while others are unduly favored. To enable it to avoid such a result, defendant has from time to time endeavored to ascertain the capacity of each mine, and in that connection has caused examinations and tests to be made and rated the mines in accordance with results thus obtained. It has employed experts who have visited the mines, examined the different seams of coal and noted the number and nature of the working places and the equipment used in operation, such as tracks, mining cars, etc., and afterwards reported to defendant the result of their investigations. Defendant has also tested the capacity of different mines by furnishing to the mine operators during short periods of time more cars than they could use, and then taking notice of the number loaded under such circumstances. These examinations and tests, if honestly and impartially made and applied, assist in the making of equitable distributions; otherwise, they cause unjust discrimination instead of furnishing the means of avoiding it.

Defendant's superintendent testified that, measured by the rated capacity of the different mines, the percentages of all cars required that defendant was able to furnish during the first three months of the year 1903 were as follows: January 22.50, February 24.65 and March 27.11.

Defendant is indirectly interested in the Somerset Coal Company, which operates 16 different mines in the Meyersdale district, whose capacity in the aggregate is between ten and eleven thousand tons per day, and complainants introduced some testimony tending to show that the ratings given to some of those mines were too high. Of course if this were true the percentages mentioned above would be too low. However, complainants' testimony in this regard was meager and indefinite and not sufficient, in our opinion, to overthrow positive statements to the contrary made by defendant's witnesses. We therefore find the ability of defendant to furnish coal cars during the months of January, February and March, 1903, to be as stated by its superintendent as aforesaid.

Complainants do not claim, and the record does not disclose anything tending to show, that previous to said January 8 defendant had been negligent and had not equipped its road in

such a manner as to provide reasonable accommodations for the transportation of traffic from and to points located thereon. And the unusual scarcity of cars during the winter of 1902-1903 could not have been avoided by the exercise of due care and diligence by defendant.

Of the coal complainants could have mined and shipped during the month of January, 22.50 per cent would be 151 tons, while 24.65 per cent of the amount they could have mined and shipped thereafter to and including February 25 would be 169 tons, making a total of 320 tons; and all this could have been loaded into the 8 cars complainants obtained previous to the latter date and subsequent to the 8th of January.

Of the amount of coal complainants could have taken out of the Glade City mine, hauled to Meyersdale or Keystone Junction and loaded into the cars there during the last three days of the month of February, 24.65 per cent would be 22 tons, while during the first 25 days of the month of March, 27.11 per cent would be 171 tons, making a total of 193 tons. During the last two periods of time defendant furnished no cars to complainants, and during those periods complainants could have sold their coal f. o. b. at Meyersdale or Keystone Junction for \$2 per ton, while the cost to them of delivering it there, as hereinbefore stated, would have been \$1.50 per ton.

Of the amount of coal complainants could have taken out of the Mosgrave mine, hauled to Meyersdale and loaded into the cars there during the last three days of the month of February, 24.65 per cent would be 6 tons, while during the first 25 days of the month of March, 27.11 per cent would be 45 tons, making a total of 51 tons. But while complainants could have sold this coal f. o. b. at Meyersdale for \$2 per ton it would have cost them there, as we have before stated, exactly that amount.

If defendant was legally bound to furnish to complainants at Meyersdale and Keystone Junction during the period of time between February 25 and March 26, 1903, such a proportion of the cars at its disposal as complainants' requirements bore to the requirements of all shippers, the damages suffered by complainants in consequence of defendant's refusal to do so, and for
10 I. C. C. REP.

which defendant should be required to make reparation, is 50 cents per ton on 193 tons of coal, or the sum of \$96.50.

But defendant contends that such refusal was not a violation of the Act to regulate commerce; first, because it applied, not alone to complainants, but also to all other shippers; and second, because the loading of coal at Meyersdale and Keystone Junction interferes with the loading of other freight articles and is otherwise detrimental to defendant's interests.

Where coal is shipped in carloads two different methods of loading are used; namely, loading from tipples and loading from wagons or sleds. The latter is also called team-track loading. If the output of a mine is large, a side-track connecting it with defendant's main line of road is usually constructed, the expense of construction being paid either wholly by the mine operator or defendant, or partly by each of them. Immediately adjacent to the side-track, which is used only in connection with the business of the particular mine, a tippie is built; that is to say, a platform is erected, high enough so that coal can be hauled thereupon and dumped into a chute depending therefrom. The chute is so arranged that empty cars can be placed directly under it on the side-track and loaded rapidly and at comparatively small expense to the mine operator; but the capacity of different tipples varies according to the variation in capacity of the mines in connection with which they are used. Although the cost of a tippie depends upon its size and character, such cost, generally speaking, is considerable; that of one mentioned in the record was said to be \$90,000. If the output of the mine is small, the mine operator cannot afford to build a tippie; and, should he wish to connect his mine by side-track with defendants' main line of road, it is probable that he would not be permitted to do so, because defendant would not consider the increase of business it would thus obtain sufficient to offset the additional risk it would be subjected to by such connection. The mine operator would therefore be compelled to haul his coal on wagons or sleds to some side-track already constructed and in operation, where he would either shovel or dump it from the wagons or sleds into the cars. The expense of this method of loading depends largely, of course, upon the length of the haul

10 I. C. C. REP.

from the mine to the side-track, but it is always much greater than the expense of loading from tipples and is seldom resorted to unless the price of coal in market is abnormally high. Under normal conditions, team-track loaders cannot compete successfully with those who load from tipples. Mines from which the coal is thus hauled on wagons or sleds are called farm banks, to distinguish them from mines where the loading is done from tipples.

Previous to the winter of 1902-1903 some team-track-loading had been done, but it was insignificant in amount when compared with the loading from tipples. In consequence of the high price of coal during that winter, brought about largely by the strike of employees hereinbefore referred to, owners of farm banks opened them up, began to take coal therefrom, and requested defendant to furnish them cars in which to ship it to market. For a short time, apparently, defendant complied with such requests, regardless of where the loading was to be done, but it did not have at its disposal a sufficient number of cars to meet all requirements of shippers, and those who loaded from tipples, being anxious to make all the shipments they could, and noticing that new conditions brought about by the opening of farm banks caused cars to be more scarce than they otherwise would be, insisted that the supply to team-track loaders should be shut off. The former argued that they had built tipples and invested much more money than the latter and were therefore entitled to greater consideration. Defendant apparently sympathized with the position taken by those who loaded from tipples, and being willing to assist them in the matter as much as it lawfully could made an investigation of the new conditions. It ascertained that previous to the change caused by the advance in the price of coal its side-track facilities, in some instances, were only sufficient to accommodate the loading of freight articles other than coal, and that permitting coal to be loaded from wagons or sleds under such circumstances interfered with the loading of other traffic. It also discovered that the wider distribution of cars made necessary a greater amount of switching, and came to the conclusion that more service could be gotten out of its coal cars if the number of points where coal could be load-

10 I. C. C. REP.

ed from wagons or sleds were made less. Accordingly, it decided to and did issue an order, dated on or about January 23, 1903, prohibiting such loading at certain points, including Meyersdale and Keystone Junction, and designating Sand Patch, Rockwood and Boynton as the only places in the vicinity of complainants' mines where team-track loading of coal would be permitted. This order applied indiscriminately to all shippers.

Of the shipping points last above mentioned Sand Patch is the nearest to complainants' mines. Distances thereto are, from the Glade City mine about 3 miles, and from the Mosgrave mine about 5 miles.

Complainants claim, and we find, that they could have loaded their coal more rapidly at Meyersdale or Keystone Junction than at Sand Patch. Therefore more service could have been gotten out of the cars in the former than in the latter instance.

No shipments of coal from Sand Patch were shown, and from what the record discloses we think it probable that no coal was loaded at that point. Consequently, supplying cars at Meyersdale or Keystone Junction would have required no wider distribution than would have been necessary had they been supplied at Sand Patch.

Complainants did not ask permission to load coal on any of defendant's side-tracks, and the loading they wished to do would not have been detrimental to defendant's interests on account of interfering with the loading of other traffic. The only way of transferring cars from the Deal side-track at Meyersdale to defendant's main line is over another side-track upon which lumber and perhaps some other freight articles are loaded, but at that point defendant's team track, properly so-called, is situated on the south side, while the Deal side-track is located on the north side, of defendant's main line.

Another matter advanced by defendant in justification of the discrimination referred to is the danger connected with the transfer of cars between the Deal side-track and defendant's main line, which, at and near the point where they intersect each other, are constructed on a grade. On account of this grade, such danger is greater than it otherwise would be, but no greater than that connected with the transfer of cars between the main

line and the side-track where lumber is loaded as hereinbefore stated. Also, the record shows that a side-track where a tipple is used is generally constructed in this manner, to facilitate the movement of cars thereon for loading purposes. When defendant supplies empty cars in such a case it moves them up the grade to a point beyond the tipple, and they can be moved afterwards in the opposite direction without difficulty, as occasion requires, by those who load them.

Defendant also claims that the enforcement of said order was a benefit to the general public and therefore justifiable. It contends that during the period of time in question, because of the great scarcity of coal at consuming points, the interests of the public demanded that defendant should get the greatest service possible out of its coal cars. But, as hereinbefore shown, the amount of such service would not have been increased by compelling complainants to load at Sand Patch, Rockwood or Boynton, instead of permitting them to load at Meyersdale or Keystone Junction.

The amount of coal loaded from wagons and sleds at Boynton and Rockwood was not definitely shown, but defendant's superintendent stated that eight different parties applied for permission to do such loading at Boynton.

On January 26, 1903, defendant amended its schedules of rates and charges by publishing a supplement thereto, providing that on and after that date coal loaded into a car from a side-track where a tipple was not used would be subject to an additional charge of 50 cents per ton; that is to say, if coal were loaded from wagons or sleds the charge for transporting it would be 50 cents per ton more than if it were loaded from a tipple.

The purpose of this was to further discourage team-track loading of coal and provide additional compensation for services connected with the transportation of coal so loaded. Defendant insists that the discrimination thus made is justified by the difference in cost of service,—that is, the cost of services connected with the transportation of coal when it is loaded from a tipple as compared with such cost when the coal is loaded from wagons or sleds. On the other hand, complainants contend that said amendment is unreasonable to the full extent of the addi-

10 I. C. C. REP.

tional charge and results in undue discrimination against them, and against all other shippers of coal except those who load from tipples.

The examination thus rendered necessary is somewhat different from that hereinbefore made. While the issue connected with the charge of discrimination in the matter of furnishing cars was between loading from tipples and certain team-track loading on the one hand, and such loading as complainants asked permission to do on the other, the amendment now under consideration places loading by tipple in one class and all other loading in another, and therefore makes it necessary to compare the circumstances connected with the transportation of coal loaded from tipples, first, with those connected with the transportation of such shipments as complainants wished to make, and, second, with the circumstances connected with the transportation of coal loaded on defendant's team tracks when a tipple is not used. Some of the facts pertaining to the former issue are also applicable to the latter, but the application is so obvious that we deem repetition unnecessary.

Previous to January 26, when coal was shipped in carloads and in bulk, the charges exacted by defendant for its transportation were the same whether it was loaded from tipples or not, and defendant does not make any distinction in its carload rates now, except when the traffic transported is coal.

What is known as the Connellsville division of defendant's road runs from Cumberland, Md., in a northwesterly direction through the Meyersdale district, and from the main line, which passes through Sand Patch, Keystone Junction, Meyersdale, Salisbury Junction and Garrett, all in the State of Pennsylvania, to Connellsville, Pa., several branches extend in different directions. Of these one, having a mileage of 13 or 14 miles and called the Salisbury branch, runs from Salisbury Junction to Salisbury and other points, and another, called the Berlin branch, runs from Garrett to Berlin, a distance of 8 miles. Distances in miles from Cumberland to said main-line points are as follows: Sand Patch 33, Keystone Junction 35, Meyersdale 37, Salisbury Junction 39, Garrett 42 and Connellsville 93.

10 I. C. C. REP.

Rockwood is also on the main line 12 miles westerly of Meyersdale.

Freight traffic on this division is accommodated by both through and local trains, but the number of each kind operated daily is not disclosed by the record. Through trains are so designated because they handle generally only carload freight and make comparatively few stops en route. On the other hand, the word local is applied to trains that are supposed to stop at any point on the line and perform such services as may be necessary in connection with the transportation of either carload or less than carload traffic. The former, therefore, are run between Connellsville and Cumberland in less time than the latter and, compared with the amount of traffic hauled, are operated at less expense to defendant. Owing to the location of the farm-bank mines most of the coal shipped therefrom, though not all of it, was taken to Cumberland in local trains.

There is a large number of coal mines on the Salisbury and Berlin branches and the loading of coal there is almost entirely by tipple. These mines, some of which are quite large while others are comparatively small, produce more than one-half of the coal shipped from the Meyersdale district.

Where tipples are used, some of the mines produce, severally, 15 or 20 carloads a day, while the individual output of others is not more than one or two carloads daily. In this connection, defendant's superintendent of transportation stated that in some cases only 1 car a day would be loaded from a tipple, while in other cases the mines would each furnish a full train load.

Defendant employs switching engines to distribute empty cars and collect loaded cars between points on these two branches and Salisbury Junction and Garrett, and the loaded cars are hauled from the latter two points to Cumberland in both through and local trains. Of course where a mine furnishes a train load a day the cost per car to defendant is less than when only a carload a day is furnished, but defendant's charge is the same in either case.

The Deal side-track at Meyersdale has already been described and what has been said concerning the side-track at Keystone Junction is about all the information of the kind that the record

10 I. C. C. REP.

contains. It may therefore be assumed that there is no special difficulty connected with the transfer of cars between the latter side-track and defendant's main line.

When defendant furnishes cars on its team tracks to be loaded with coal from wagons or sleds it meets with some difficulties that do not pertain, ordinarily, to coal loaded on private sidings. In placing the cars on or taking them from the team-track siding it may have to handle cars placed there for the purpose of being loaded with other freight articles. This subjects defendant to some additional expense, but is a circumstance that pertains not only to coal but also to other traffic shipped in carloads, such as hay, grain, etc. In addition to this, if a platform be built along the team track to facilitate the loading of the coal—which, however, could not be done without defendant's consent—defendant may have to be more particular than would otherwise be necessary about placing the cars.

Of course the time required to load a car depends largely, in each case, upon the loading facilities, and it has been shown that the loading can be done by tipples more rapidly than in any other way. The record shows that complainants always loaded a car within one day after they received it; that in a few instances empty cars furnished in the morning to mines where tipples were used on the Salisbury and Berlin branches were loaded and on their way to market before evening of the same day, although some of the empty cars remained unloaded, ordinarily, until the following day; and defendant's witnesses estimated at two or three days the average time that would be required to load a car with coal on defendant's team tracks, if a tipples were not used.

The use of cars by shippers for loading purposes is usually regulated by what is known as a demurrage charge; that is to say, the shipper is compelled to pay, in addition to the regular transportation charges, one dollar for each 24 hours or portion thereof that the car is detained after a certain time. The free time allowed for loading varies according to the character of the traffic loaded, but is never less than 24 hours. When a carrier has more cars than it needs this charge is more than sufficient, but when it has not as many as the business of its patrons re-

quires the charge is less than sufficient, to compensate the carrier for the use of cars so detained.

As hereinbefore stated, the average loading of coal in the Meyersdale district is 40 tons to the car. The additional charge of 50 cents per ton, therefore, would amount to \$20 a car; and this is exacted, except when the coal is loaded from a tipple, regardless of the time consumed in loading.

Coal produced in the Meyersdale district is transported by way of Cumberland to eastern markets, and although the length of the haul varies considerably because of the different locations of the shipping points, defendant makes no difference in its charges on that account.

Defendant's counsel did not call our attention to a single instance where any other carrier, because of a difference in the method of loading, has made a difference in the charge exacted for transporting freight articles shipped in carloads; and our general knowledge, coupled with such an examination of the files in this office as it has been practicable to make, inclines us to the opinion that, aside from the case in hand, no such distinction has been made since the Act to regulate commerce became operative.

We think it clear that during the period of time in question, that is, between January 8 and March 26, 1903, defendant was desirous of discouraging team-track loading and wished to confine the shipment of coal to mines where the loading was done from tipples, and the reason for this is perfectly apparent. While it is true that in some instances as much coal is loaded in a day from wagons or sleds at one point as from a tipple at another point, this is not true generally. The cost of a tipple, as already stated, is considerable, and a mine operator would not incur the expense of constructing one unless he expected to ship a large amount of coal. Therefore, the fact that a tipple had been constructed and was in operation at a particular mine would be some evidence tending to show that the output of that mine was comparatively large. On the other hand, the advantage of loading from tipples over loading from wagons or sleds is so great that a person who expected to ship a large amount of coal from a mine would be likely to build a tipple there, and the

10 I. C. C. REP.

fact that he had not done so would tend to show that he expected his daily shipments to be comparatively small. As a general proposition, therefore, we may call those who load from tipples large shippers and those who load from wagons or sleds small shippers.

When prices in market are normal the demand for cars is likely to be normal also, and shippers can then obtain, ordinarily, all the cars they require. Under these circumstances, the bulk of the shipping is done by large shippers. At such times the margin of profit is small and those who ship in small quantities cannot compete successfully with those who ship in large quantities, because the latter have advantages over the former, an example of which would be the difference in expense between loading from tipples and from wagons or sleds.

But all this is changed when prices in market become abnormally high. An increase in the margin of profit generally accompanies an increase in the price of the goods shipped, and the small shipper is then able to do some business in competition with the large shipper. At such times the demand for cars increases, because all shippers are anxious to obtain them in order that they may make shipments and thus secure the larger margin of profit; and the insufficiency of the supply of cars increases according as the demand for them increases. An increase in the number of small shippers is likely to be accompanied by an increase in the number of shipping points, which in turn makes necessary a wider distribution of cars and a greater amount of switching; and there is also liable to be a decrease at such times in the amount of service that can be gotten out of the cars. And all these things, taken together, tend to increase the cost per car of performing the transportation. Under these circumstances there is a great temptation to discriminate between large and small shippers, because, the supply of cars being insufficient to meet all requirements, the carrier can make the number of shipping points less without decreasing the amount of traffic secured.

But coal is not the only kind of traffic to which the above applies. Hay and grain are loaded from wagons and sleds on team tracks, while hay is also loaded from storehouses and grain from

elevators; and in either of the latter instances the tonnage shipped is much greater and the loading more rapid than when the shipments are from team tracks and the loading from wagons or sleds. Many illustrations of a similar nature pertaining to iron, steel, and other heavy freight articles shipped in carloads might be made, but what has been said is sufficient to show the importance of the principle involved.

A discrimination like the one referred to might be a benefit temporarily to the carrier and in some instances to consumers, but it would be an injury to small shippers, and a corresponding benefit to large shippers, and, as it would tend to create a monopoly in the latter, might also affect injuriously the interests of the general public.

The record shows that the general officers of the Consolidation Coal Company and the Somerset Coal Company are the same; that defendant owns capital stock of the former company to an amount exceeding \$5,000,000; and that the latter company ships more than one-half of the coal transported from mines in the Meyersdale district.

During the period of time in question the price of coal in market was abnormally high, and defendant was short of motive power and did not have cars enough to meet all requirements of shippers. What it did under these circumstances has been, we think, fully and fairly stated, and it only remains to determine whether or not its actions in the premises were in violation of the provisions of the Act to regulate commerce.

We believe the facts disclosed by the record warrant specific findings as follows:

That from February 25 to March 26, 1903, by refusing to furnish cars to complainants on the Deal side-track at Meyersdale and the side-track of the Savage Fire Brick Company at Keystone Junction, while furnishing cars to complainants' competitors at other points as aforesaid, defendant subjected complainants to undue and unreasonable prejudice and disadvantage and gave to such competitors undue and unreasonable preference and advantage;

That by enforcing the provisions of the amendment of January 26, 1903, defendant subjected, first, complainants, and second I. C. C. REP.—16.

ond, all other shippers of coal in carloads, except those who load from tipples, to the payment of unreasonable rates of transportation and to undue and unreasonable prejudice and disadvantage, and gave to those who ship coal in carloads and load it from tipples undue and unreasonable preference and advantage; and

That the additional charge of 50 cents per ton provided for in said amendment is unreasonable and unjust to the full extent thereof and should be abolished.

CONCLUSIONS.

Based upon the foregoing findings of fact, our conclusions are as follows:

The shortage of coal cars that prevailed in the Meyersdale district during the period of time between January 8 and March 26, 1903, was not caused by negligence on the part of defendant, but by circumstances over which it had no control. Therefore, defendant is not responsible for damages suffered by complainants during that period in consequence of its failure to furnish to them more than such a proportion of the cars at its disposal as their requirements bore to the requirements of all shippers. Between January 8 and February 25, 1903, complainants obtained such a proportion; consequently there was no discrimination against them in the matter of furnishing cars previous to the latter date.

But by refusing to furnish such a proportion of cars to complainants on the Deal side-track at Meyersdale and the side-track of the Savage Fire Brick Company at Keystone Junction between February 25 and March 26, 1903, while furnishing and offering to furnish cars to complainants' competitors at Sand Patch, Rockwood, Boynton and other points, to be loaded from wagons and sleds and from tipples, defendant subjected complainants to undue and unreasonable prejudice and disadvantage and gave to such competitors undue and unreasonable preference and advantage, in violation of section 3 of the Act, and should be required to compensate complainants for the damage they suffered in consequence of such refusal, which, as stated in the findings of fact, is 50 cents per ton on 193 tons of coal, or the sum of \$96.50.

Defendant admits the discrimination, but insists that it was justified by the circumstances under which it was made. Matters advanced in justification may be arranged under two heads as follows: (1) The interests of the defendant. (2) The interests of the general public.

The benefits defendant claims it derived from restricting loading from wagons and sleds as above are: interference with the loading of traffic other than coal on defendant's team track at Meyersdale was avoided; car distribution was confined within narrower limits; the amount of switching was made less; the service secured from its cars and other equipment was increased in amount; and the comparative cost to defendant of performing the transportation was reduced.

But, as stated in the findings of fact, complainants did not ask permission to load on defendant's team track at either Meyersdale or Keystone Junction, and the loading of coal they wished to do would not have injured defendant on account of interfering with the loading of other traffic. Also, there would have been no material difference either in the distribution of cars or switching services if complainants had loaded at Sand Patch instead of at Meyersdale or Keystone Junction. It is therefore difficult to see how the restriction referred to could have changed materially either the cost of transportation or the service that could have been secured from defendant's equipment.

The benefit to the general public referred to by defendant is the advantage consumers might have secured through an increase in the tonnage of coal shipped to market during the period in question, coal in market during that period having been very scarce. But what has been said above makes it evident that not much increase in the tonnage shipped could have resulted from the discrimination actually made.

However, we do not consider it at all clear that the interests of the public, in the true sense of that term, would be subserved by a reduction in the number of shippers and shipping points. On the contrary, we think such interests demand that all persons wishing to ship goods to market shall be given a reasonable opportunity to do so. Competition is considered a public bene-
10 I. C. C. REP.

fit, and the greater the number of shippers the greater the competition among them will probably be. If defendant can say that the man who has only one carload to ship shall not be allowed to ship it and confine the privilege of shipping to those who have two carloads or more, and then justify the discrimination by claiming it will cause an increase in the tonnage shipped, it can go still further and say that only those who can ship in full train loads shall be allowed to engage in the business of shipping. No argument is necessary to show that such action would be unreasonable and therefore unlawful.

But an increase instead of a decrease in the tonnage shipped *might* result from an increase in the number of shippers. The fewer the number of shippers the greater the opportunity for manipulating the market and decreasing the tonnage. Evidence of such manipulation in the coal business during the winter of 1902-1903 was so manifest that we might almost take judicial notice of the fact; and because of the experience consumers of coal then had it would probably be difficult to convince them that they would be benefited by reducing the number of shippers.

However, we do not wish to be understood as saying that a carrier cannot make and enforce regulations pertaining to shipments over its line of railway, if doing so does not result in unjust discrimination. That it may do so freely within the bounds of reasonableness is admitted.

Since the Act to regulate commerce became operative, what is reasonable for a common carrier to do in a given case depends largely upon what it contemporaneously does in another. The circumstances disclosed by the record in this case do not make it necessary for us to say whether or not it would be reasonable for defendant to prohibit entirely the loading of coal on its team tracks, or confine such loading to certain specified team tracks, or provide that no coal should be loaded at any point on its road except from a tippie. Consequently, we do not pass upon these questions. We simply say that by refusing to furnish cars to complainants on the Deal side-track at Meyersdale and the side-track of the Savage Fire Brick Company at Keystone Junction, while contemporaneously furnishing and offering to furnish

10 I. C. C. REP.

cars to complainants' competitors to be loaded from wagons and sleds at Sand Patch, Rockwood and Boynton and from tipples at other points, regardless of the time consumed in loading the cars, defendant discriminated unduly against complainants, in violation of section three of the Act to regulate commerce. In other words the discrimination in this particular case was undue and unreasonable because it was an injury to complainants and was not justified by the circumstances under which it was made.

Authorities cited by the defendant's attorneys in support of defendant's right to make the discrimination above referred to are as follows: *Riddle, Dean & Company v. Pittsburg & Lake Erie Railroad Company*, 1 I. C. C. Rep. 374, 1 Inters. Com. Rep. 688; *United States ex rel. Coffman v. Norfolk & Western Railway Company et al.*, 109 Fed. 831; *Harp v. Choctaw, O. & G. Ry. Co.* 118 Fed. 169; and *Robinson et al v. Baltimore & Ohio Railroad Company*, decided by the Circuit Court of Appeals of the Fourth Circuit, March 14, 1904.

The complaint in the Riddle, Dean & Company case so far as material here was that the defendant discriminated against the complainants by refusing to furnish them cars for shipments of coal to Buffalo, N. Y., while it contemporaneously furnished complainants' competitors cars for shipments of coal to other points. The Commission found that during the time in question, because of a condition brought about by circumstances over which the defendant had no control and for which it was in no way to blame, the defendant was unable, with all its freight equipment added to the freight cars supplied to it by its connecting lines, to move promptly more than one-half of the traffic offered to it for transportation; that Buffalo was not located on the defendant's line of railway; that such refusal applied alike to all shippers and enabled the defendant to furnish more cars to patrons of its road than would otherwise be possible; and therefore concluded that the discrimination was not undue or unreasonable. In this connection the Commission said: "Under such circumstances the legal duty of this railroad company was, as the evidence shows it did, to operate its cars so as to keep them as much as possible on its line and confined to the business of its line. If, in that crisis, it could not furnish suf-

10 I. C. C. REP.

ficient cars to all the shippers along its line for the amount of their freight, then it was its duty to have done what is shown by the evidence it did, and this was to fairly endeavor to furnish its cars to shippers of coal in proportion to their shipments over its line upon a basis that was relatively and substantially just." We think the decision in that case was right and that it is entirely consistent with the decision in this case.

The decision in the Coffman case was in pursuance of an alternative writ of mandamus issued against the defendant commanding it to furnish cars for shipments of coal as prayed for in the relator's petition, or appear before the court and show cause to the contrary. The gist of the complaint was discrimination in the matter of furnishing cars. Material facts developed at the trial were as follows: On behalf of the complainant it was shown that Coffman, who represented the Indian Ridge Coal & Coke Company, had not received a sufficient number of cars in which to ship as much coal as the Indian Ridge mine was capable of shipping; that something like 300 cars were weekly distributed to the various coal operators in the field in which the Indian Ridge is situated, in which distribution the Indian Ridge Coal & Coke Company did not participate; and that certain arbitraries were allowed certain coal operators in that territory; that is to say, that the Southwest Virginia Improvement Company and other coal operators in the general Pocahontas coal field were arbitrarily allotted a certain number of cars in addition to the allotment to other operators in that field. Upon behalf of the railway company and the other respondents it was shown as follows: That it was true that Coffman did not receive a sufficient number of cars at all times, and in every case, in which to ship the full output of his principal, the Indian Ridge Coal & Coke Company, but that every other coal operator in the field was in the same situation, and that the possibilities of one were not met any more than the possibilities of the other, but that each and all were graded and treated alike without fear or favor, without discrimination for either, or against any; that the railway had done the best for each it could, and that it did not discriminate against any; that the 300 cars, more or less, distributed among the other operators,

and in which the Indian Ridge did not participate, were cars placed by the railway company at the various mines, not for traffic, state or interstate, but for railroad fuel alone; and that the reason why Coffman and his Indian Ridge principal did not participate therein was because they had refused to sell the railway company its fuel coal upon the same terms that it could purchase it from other operators; and that the arbitraries referred to were the result of an agreement entered into between the railway company on the one hand and those interested in making shipments of coal and coke on the other, whereby certain differences in cost of transportation, etc., were to be offset by certain differences in the allotment of cars. Under these circumstances, the court held, citing the Riddle, Dean & Company case, *supra*, that undue discrimination had not been shown. We observe no inconsistency between this holding and the conclusions reached by us in the present case.

Facts in the Harp case were as follows: Previous to August 14, 1901, the defendant permitted the loading of coal from wagons on its team tracks at Hartford, Ark.; for a period of time thereafter it refused to allow such loading, and the complainant brought suit to recover damages suffered by him in consequence of such refusal. The court found that during said period the demand for cars was much greater than the supply; that the loading of coal from wagons on said team tracks was necessarily slow, had a tendency to reduce the maximum shipping facilities of the road, delayed and interfered with commercial traffic, and rendered dangerous the operation of the road to the defendant's employees, persons employed in loading the cars from wagons, and the traveling public; that during said period there was no loading of coal from a team track of the defendant at any other point; that loading of coal was then principally by tipple on private sidings connected with defendant's main line, except that some loading by wagon from strip pits was being done, but always on the private tracks of the operators; and this was not allowed except temporarily to enable the operator to open his mine, and for the reason that a tipple could not be used until the stripping was stopped, and what is called the "slope" was begun. Under these circumstances the 10 I. C. C. REP.

court held that unlawful discrimination against the complainant had not been proven.

It will be observed that the circumstances in the Harp case differ widely from those disclosed in this proceeding. There the court held that refusing to permit the complainant to load from wagons on the defendant's team tracks at Hartford while allowing others to load from wagons on private sidings elsewhere was not unlawful discrimination. Here the complaint is that while refusing to permit complainants to load from wagons on private sidings at Meyersdale and Keystone Junction defendant allowed complainants' competitors to load from wagons on its team tracks at Sand Patch, Rockwood and Boynton. Instead of being an authority against our conclusions the decision in the Harp case seems to support them. As the matter appears to us, the inference to be drawn from that case is that to permit loading from wagons or sleds on any of defendant's team tracks while refusing to permit such loading on private sidings elsewhere would be unjust discrimination.

The decision in the Robinson case was on an appeal from a decree of the Circuit Court of the Northern District of West Virginia, perpetuating an injunction inhibiting Robinson and others from attempting to ship coal against the consent of the Baltimore & Ohio Railroad Company, in the City of Fairmont, West Virginia, at a point known as Walker's Siding, or at any depot of the railroad company except the depot or point provided by the railroad company for the reception and shipment of coal. Facts recited by the Circuit Court of Appeals are as follows: Walker's Siding and a roadway about 60 feet wide leading thereto are owned by the B. & O. Company; the company places cars there to receive and deliver all kinds of goods and merchandise except coal; previous to the winter of 1902 some coal also had been received there, but on account of the scarcity of coal during that winter and the rise in price the quantity shipped at Walker's Siding became so great that it interfered with other merchandise, and the company was compelled in the reasonable regulation of its business to provide another place for shipping coal from Fairmont. Accordingly, it designated a place on the Belt Line in that city where it would

receive coal for shipment and notified appellants to that effect. It also notified them that it would not thereafter receive coal at Walker's Siding. Notwithstanding these notices appellants made persistent efforts to block up with teams the approaches to Walker's Siding, took possession of cars intended for shippers of other merchandise, and dumped coal at the siding and station. This resulted during two days in suspending all freight business and threatened to continue indefinitely until the appellants had compelled submission to their demands. The Circuit Court of Appeals, after stating that the place so designated, although a more distant one for appellants, was not shown to be an unreasonable place in any way, and that the condition created by appellants was a public nuisance and liable to cause irreparable mischief before the tardiness of the law could suppress it, affirmed the decree of the Circuit Court.

As stated in the findings of fact in this case, complainants did not ask permission to load coal on any of defendant's side-tracks, and the loading they wished to do would not have injured defendant by interfering with the loading of other traffic. Under these circumstances, we think to require them to haul their coal by Meyersdale or Keystone Junction to another point on defendant's road was unreasonable; and therefore we see no reason why our decision in this case should be controlled by that in the Robinson case.

We conclude that the amendment of January 26, 1903, providing for an additional charge of 50 cents per ton in certain cases is unreasonable and results in undue discrimination, first against complainants, and, second, against all other shippers of coal except those who load from tipples, and is, therefore, in violation of sections 1 and 3 of the Act.

Generally speaking, matters advanced by defendant in justification of this amendment and the discrimination that resulted therefrom are included in the differences that nearly always exist between the cost of services connected with the transportation of through traffic on the one hand and local traffic on the other, but while such cost per carload is usually somewhat less in the former than in the latter instance, carriers do not, ordinarily, make any difference in the rate on that account. The
10 I. C. C. REP.

rate on local traffic is not greater unless the distance it is transported is greater or the rate on the through traffic is fixed by competition which the particular carrier is unable to control; but neither of these conditions applies to the case now under consideration. Such competition does not exist, and the additional charge is made regardless of the length of the haul.

In the Matter of the Petition of the Louisville & Nashville Railroad Company, 1 I. C. C. Rep. 31, 1 Inters. Com. Rep. 279, the defendant contended that the greater charge for the shorter distance was justified by greater cost of service, the shorter-distance traffic being hauled in local trains, while the longer-distance traffic was hauled in through trains. In passing upon this contention, Cooley, Chairman, in delivering the opinion of the Commission, said: "It may be neither unreasonable nor unjust to accept the lower rates for the long haul traffic in some cases on grounds stated further on; but it will not be because of any such inherent difference between long and short haul traffic as can make the latter chargeable with heavier burdens.

. . . It is obvious that the statute intends that the greater charge for the shorter haul shall only be made in cases which on the facts are exceptional; and when the carrier shows the general fact that the local traffic is most expensive, he thereby proves, not the exception, but the rule. To establish the exception, it would be necessary to go further and make proof that in the case of the particular traffic the difference in cost would be exceptionally great."

While the language above quoted was used in connection with the fourth section of the Act, we think the principle involved is applicable to the present case. An examination of the case above referred to will show that the exceptional circumstances mentioned by Chairman Cooley include competition which the carrier seeking to justify the greater charge for the shorter haul is unable to control, such as the competition of water carriers when the Act to regulate commerce does not apply, or the competition of a direct route between two points as compared with a circuitous route.

In determining the rates to be charged for transportation, cost of service is one of the principal elements to be considered, but

10 I. C. C. REP.

it is not and should not be considered as a controlling element. While a carrier may gain some slight benefit by adopting a policy that will centralize the business of shipping when equipment is scarce, the interests both of carriers and of the general public, broadly speaking, lie in an opposite direction; and the general practice of carriers whereby no difference in rate is made because of difference in cost between different methods of loading or between local and through train service is, therefore, entirely justifiable.

For similar reasons, we think differences in rates because of differences in tonnage shipped should be confined, ordinarily, to such distinctions as are made between carload and less than carload shipments. In the case of *Paine Brothers & Company v. Lehigh Valley Railroad Company et al.*, 7 I. C. C. Rep. 218, the complaint was that the defendants charged higher rates for transporting grain when only a single carload was shipped than when a cargo consisting of several carloads was shipped and in passing upon this question we said: "But conceding that lower rates on export than on domestic grain may be properly allowed, we perceive no sufficient reason for different rates on carload than on cargo or train load shipments, whether grain is carried for export or for domestic use. The principle involved in such a distinction violates the rule of equality and tends to defeat its just and wholesome purpose. That purpose is not fully accomplished if one scale of charges is applied to cargo shipments and a higher rate is imposed for single carloads, even though all cargo shippers pay the same and all carload shippers are charged alike." And again, in *Carr v. Northern Pacific Railway Company*, 9 I. C. C. Rep. 1, language used in the opinion of the Commission was as follows: "A carload rate lower than the less than carload rate, where the difference is not too great, would ordinarily be lawful; but a still lower rate for shipments of a hundred or a thousand carloads, though duly published and impartially applied, would be wholly indefensible. If a low rate is granted on conditions with which only a few can comply that rate is presumably unfair and may be extremely prejudicial to all other shippers of like traffic, be-

10 I. C. C. REP.

cause they are practically unable to meet the terms upon which it is offered."

In the case before us the record shows that under normal conditions and with equal rates of transportation those who load coal from wagons or sleds cannot compete successfully with those who load from tipples. It is therefore evident that shipments cannot be made from any of the large number of farm banks in the Meyersdale district, except when prices in market are extremely high, if the additional charge of 50 cents per ton provided for in the amendment of January 26 is exacted.

We have said that the distinction defendant seeks to make through the amendment in question is in the nature of an innovation and one that has not been made heretofore by carriers, and that the principle involved applies to many kinds of traffic besides coal. Upon the facts appearing in this case we are not prepared to sanction such a departure from general and long-established custom.

A large tonnage of hay is shipped annually from producing points in the West to consuming points in the South and East, and while the hay is loaded into cars from wagons and sleds by producers on the one hand and from storehouses by larger dealers on the other, and while the average time consumed in loading is greater in the former instance than the latter, the transportation charges are not for that reason made greater. A reasonable time for loading is allowed in each instance, and when this is exceeded a demurrage charge, presumably commensurate with the additional time the car is detained, is exacted. The same thing is true of grain, which is loaded from wagons and sleds and from elevators, and many similar illustrations pertaining to traffic shipped in carloads might be made.

It will thus be seen that the distinction in question, if carried to its logical conclusion, would result in a great change of present conditions. If carriers are allowed to make differences in rates to equalize differences in the cost of transportation, and see fit to do so regardless of the effect upon shippers and localities, the ultimate result must be that the bulk of the traffic will be handled by comparatively few shippers and from and to large centers. We cannot believe such a result was

either intended or desired by the framers of the regulating statute and are disposed to hold that in the transportation of this coal the difference in cost to the carrier between coal loaded from tipples and coal loaded from wagons or sleds does not justify defendant in making a difference in rate.

Even if it were conceded that because of less cost of service lower carload rates might be applied when the number of carloads shipped is greater, the amendment referred to is still open to objection, because under it the lower rate is applied if only one carload a day is shipped from a mine where the loading is by tipple, while the higher rate is exacted when the loading is from wagons or sleds, although in the latter case a number of cars might be shipped each day from the same point. It is also to be observed that the former shipments are often hauled in the same trains with the latter.

It is undoubtedly true that if a shipper detains a car for loading purposes longer than is reasonable he should be required to compensate the carrier for such detention, and if one dollar a day is not sufficient a larger sum may be exacted; but charges of this kind should always be based upon the fact of detention; otherwise, unjust discrimination is liable to result.

It should be noted that we do not decide whether or not defendant might lawfully provide that shipments of coal in carloads should not be made except where the loading is by tipple, or prohibit altogether the loading of coal from wagons or sleds on its team tracks, for those questions are not presented by the record in this proceeding. Without further discussion we summarize our conclusions as follows:

Refusing to furnish cars to complainants between February 25 and March 26, 1903, on the Deal side-track at Meyersdale and the side-track of the Savage Fire Brick Company at Keystone Junction, while furnishing and offering to furnish cars to complainants' competitors at other points, under the circumstances disclosed by the evidence and described in the findings of fact, was an undue and unlawful discrimination against complainants for which they are entitled to reparation in the amount above stated.

Making certain charges for the transportation of coal shipped
10 I. C. C. REP.

in carloads when the coal is loaded by tipple and exacting a higher charge when it is loaded in some other way, *and for that reason*, is not justified by difference in cost to the carrier between different methods of loading, or by the other facts appearing in this case, and renders the higher rates thus made unreasonable and unduly discriminatory, first, as against complainants, and second, as against all other shippers of coal except those who load by tipple, and constitutes a violation of sections 1 and 3 of said Act.

An order in accordance with the views herein expressed will be made.

10 I. C. C. REP.

No. 691.

THE GEORGIA PEACH GROWERS' ASSOCIATION
v.
THE ATLANTIC COAST LINE RAILROAD COMPANY
et al.

Decided June 4, 1904.

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1. If fruit is damaged through negligence of the carrier while in transit there is no reason why the carrier cannot be required to respond in damages to the full amount of the injury sustained without regard to the valuation placed upon it, and defendants' regulation whereby the freight rate on peaches and other fruit from Georgia points is increased in proportion to the carload valuation fixed by the shipper is unreasonable and unjust.
 2. An arbitrary charge of \$80 per car imposed by the defendant, the N. Y., N. H. & H. R. R. Co., for the transportation from New York to Boston of peaches and other fruit shipped from Georgia points to Boston, its haul being part of the through service between the points of shipment and destination, is unreasonable and unjust and \$50 per car would be a just and reasonable charge for such transportation.
 3. Upon all of the facts and circumstances, including on the one hand the difficulties and liability to loss attending the production and shipment of peaches, and on the other hand the large percentage of cars loaded above the prescribed minimum weights for carloads for which excess no charge is made by the carriers, the exceptional character of the service which involves fast time and prompt delivery at destination, the carriage of a large amount of non-paying freight, return of cars without loads, and many other conditions relating to the highly perishable nature of the traffic, *Held*, That neither the minimum carload weight nor the transportation charge established by the defendants engaged in the carriage of peaches in refrigerator cars from Georgia points to New York, based upon a rate of 81 cents from Atlanta to New York, is unreasonable or unjust.

William H. Fleming and *C. P. Steed* for complainants.

P. Frank Hennigan for Boston Fruit and Produce Exchange.

Ed Baxter for defendants.

Claudian B. Northrop for Southern Railway Company.

F. A. Farnham for The New York, New Haven & Hartford Railroad Company.

REPORT AND OPINION OF THE COMMISSION.

FIFER, *Commissioner*:

The complainant in this case is an association of growers and shippers of fruit, especially of peaches from the State of Georgia, having its principal offices in Macon in that State. One of the purposes of the association is to secure for its members just and reasonable charges for the transportation of fruit. This proceeding was brought by complainant in behalf of its members and other shippers of fruit from Georgia points to Northern and Eastern markets against the Atlantic Coast Line Railroad Company, The Central of Georgia Railway Company, The Seaboard Air Line Railway, The Southern Railway Company, The Atlanta & West Point Railroad Company, The Georgia Southern & Florida Railway Company, The Georgia Railroad Company, The Western & Atlantic Railroad Company, The Macon, Dublin & Savannah Railroad Company, The Pennsylvania Railroad Company, The New York, New Haven & Hartford Railroad Company, and The Baltimore & Ohio Railroad Company.

The petition alleges that defendants enforce a minimum carload of 20,000 pounds on cars 36 feet long or less, and of 22,500 pounds on cars longer than 36 feet and not exceeding 40 feet. The defendants admit this allegation.

The petition alleges that, in order to get the minimum rate, it is necessary to load peaches five tiers high in the cars. The defendants deny this allegation.

The petition alleges that, when crates of peaches are loaded five tiers high, the fruit in the fifth tier rots and the lower tiers are thereby damaged also before reaching market. The defendants deny this allegation.

The petition alleges that if 16,000 and 20,000 pounds were fixed as the minimum carload, respectively, for the smaller and the larger car, the minimum could be loaded in four tiers of

crates which could, when the cars are properly iced, be carried in good condition to destination. The defendants admit that four tiers could be carried in good condition, but claim that five or more tiers can be carried safely and delivered in good condition.

The petition alleges that, by the enforcing of the 20,000 and 22,500 pound minimums, the complainant is compelled to pay for weight not carried, thus being subjected to unreasonable and unjust rates of transportation, and to unjust discrimination and undue and unreasonable prejudice and disadvantage in violation of the Act to regulate commerce. The defendants deny this allegation.

The petition alleges that rates on peaches and plums from points in Georgia to New York and all other Eastern points are excessive and unreasonable, and result in unjust discriminations against Georgia in these markets. The defendants deny this allegation.

The petition complains of the arbitrary charge of \$80 per car from New York to Boston. The defendant, the New York, New Haven & Hartford Railroad Company, admits that \$80 is the rate per car, but avers that this rate is reasonable and just.

The complainant asks specifically that the minimum carload be reduced to a four-tier basis, namely; 16,464 (say 16,400) pounds for the 36-foot car, and 18,816 (say 18,750) pounds for the 40-foot car.

That the regular rate on the Eastern lines from Macon, Ga., to Charlottesville, Va., be reduced to the basis on the Western lines: namely, from 60 cents per 100 pounds to 40 cents per 100 pounds, and that such proportionate reduction as may be just may be made in the rate of 21 cents per 100 pounds from Charlottesville to New York points.

That the arbitrary charge of \$80 per car from New York to Boston points be reduced to \$30 per car.

That such other relief be granted as the Interstate Commerce Commission may deem just and equitable.

FACTS.

Shipments of Georgia peaches to Northern and Western
10 I. C. C. REP.—17.

markets were first undertaken about fifteen years ago. At that time the number of trees in Georgia orchards was quite small. It is estimated that at present there are 17 or 18 millions of trees, of which seven to eight millions are bearing fruit. There are in the State about 1600 growers of peaches who produce the fruit for commercial purposes, not including the growers who supply the local markets by wagon or basket. Of these 1600 one hundred are members of the Georgia Peach Growers' Association, the complainant in this case.

The peach crop is a very uncertain one and its cultivation is attended by many difficulties and dangers, among which are spring frosts, rain while the trees are in bloom and hail storms. The insect pests are numerous. Among these is the San Jose scale, which is extremely destructive. When an orchard is attacked by this parasite the trees are cut down by order of the State Entomologist, resulting in a total loss of the orchard. The expense for spraying in order to destroy these pests is much greater than in any other section of the country.

The rainfall in Georgia is irregular and the crop is subject to injury from excessive rainfall as well as drouth.

Perhaps the most frequent cause of failure is freezing, occurring in January, February and March. Some localities are much more exposed to frost than others. Not until the end of March can even the most experienced orchardist form an estimate of the output for the season. At that time he ordinarily can predict with approximate accuracy about what may be expected, both as to quantity and quality, and can forecast what the range of prices will be under the usual conditions of transportation and competition. Intervening frosts, hurricanes or cyclones or attacks of insects may, however, upset all these calculations, as they have done in the past.

Some growers state that it is reasonable to expect one good crop in three years, while others say that two out of three is a fairer average. Sometimes the crop in the State is an almost complete failure, involving great losses.

The following figures given by the State Entomologist of Georgia show the shipments from the State during the last six years: 1898, 2,500 carloads; 1899, no carloads, light move-

10 I. C. C. REP.

ments by express only; 1900, 2,250 carloads; 1901, 2,000 carloads; 1902, 1,800 carloads; 1903, 1,000 carloads.

From this showing it will be seen that, while the acreage of peach planting in Georgia is certainly expanding, the output of fruit has not increased in these years, but has actually diminished. That the capabilities of the State in the production of peaches have not yet been approximated is the opinion of the principal growers, several of whom testified that, under favorable conditions, in the season of 1904, 4,000 carloads might be produced.

Excessive production presents the danger of glutting the markets, with the result that prices may fall so low that the growers may not realize what the fruit has cost. This danger would be the more imminent should it occur that, not only in Georgia but in other peach-growing sections, the crop should prove abundant.

In years of short crops the growers on account of higher prices realize more per crate than the railways which transport the fruit, and in years of abundance the railways get more than the growers. While in years of light production, even with high prices, the orchardist realizes but little, in years of abundance he is menaced by the danger of glutted markets.

The uncertainties and risks of Georgia peach culture are such that it is impossible to predict from year to year the outcome of investments. Not all who have engaged in peach culture have made money and many have failed and have gone out of the business after sustaining serious losses. The industry is one that is attended with large expenses and many contingencies inviting loss, and which demands skill, experience and vigilance; at all times hard work, and during the shipping season the most strenuous exertion.

A peach orchard begins to bear three years after planting. The third year the trees yield a few peaches, and the fourth a fair crop. The average life of the tree is about 10 years. At the expiration of that period the orchard must be renewed. Generally the trees are cut down and the land planted in other crops for a few years in order that it may be "freshened."

It costs from 65 cents to 85 cents per crate of 42 pounds to 10 I. C. C. REP.

produce peaches in Georgia and lay them down at the railway ready for shipment. This does not include interest on the investment or an allowance for the time and service of the producer. Including these items the peaches cost about \$1.00 per crate. The gathering and handling of the fruit from tree to car costs about 30 cents per crate. An extensive producer testified that last year, when the output was fair, his crop realized a net return of 32 cents per crate, which, the risks of the industry considered, was alleged to be too small a margin of profit.

Not until the peaches are laid down in the market and the price prevailing at the time of their sale is known, is there certainty in regard to the profit, if any, which they will bring. The orchard may yield a heavy harvest, having escaped frost, hail and wind and the ravages of insects; the crop may have been packed and loaded and transported with the greatest care, and yet, even in a year of moderate yield, the realization in the market may prove a disappointment. It may be that the peaches have suffered from delay and damage *en route* from point of shipment to destination, or that they have reached the market in the midst of an unforeseen "glutting" by unusually large shipments, either of which contingencies has the effect of cutting down the price.

The task of transporting the Georgia peach crop from the points of production to the markets of the West, the North and the East is one involving considerable expense and responsibility, and requiring skill, care and promptness. Special facilities in the way of equipment and operation must be provided in order that the product of the orchard may be quickly moved from the shipping points and safely and expeditiously transported great distances to the markets. The peaches must be carried in special refrigerator cars in which the temperature ought to be kept uniform by repeated icings, and they must be transported at exceptionally fast speed. There must be no irregularity or delay in the operation of these trains, for the fruit should be delivered ready for the customary daily hours of sale, which are not uniform in the various cities. The tariffs imposed upon the peach traffic must yield sufficient revenue to pay for the special service rendered and yet not be so high as to be oppressive to the

peach industry or prohibitive of successful operation and development.

At the beginning of peach culture in Georgia for commercial purposes, fifteen years ago, the small output of the State was moved by express. When the output grew to greater dimensions it began to appear in freight traffic. The peaches were at first handled in ventilated cars and were sent to the ports, there to be transported by vessels. It soon became apparent that in order to develop the industry it was necessary to provide refrigeration and fast time between the peach orchards and the markets. At first the railways attempted to throw open their entire mileage to the open competition of all the companies furnishing refrigerator cars. This proved a failure, because lines of railway upon which but few peaches originated, and which demanded refrigerator cars only occasionally and in small numbers, were neglected by all the companies. It was, therefore, necessary to contract with a company possessing sufficient equipment of safe construction to successfully undertake the work, and it is alleged that the Armour Company was the only one which, at that time, met this requirement.

The Armour Company exacts $\frac{3}{4}$ of a cent a mile per car for distance traveled in the peach traffic, whether the car is loaded or empty. The mileage commences as soon as the car begins to move upon the iron of the railways engaged in this traffic and continues until the use of the car is discontinued. The Armour Company gets \$68.75 per car for icing to Boston, and the railways haul free of charge the 12,000 pounds of ice required to preserve the fruit.

The Georgia peach harvest begins the last of May or early in June and continues throughout June and July. The peaches are brought to the shipping stations in wagons and are packed by the growers in crates. The refrigerator cars are parked at various points upon the railways in such numbers as it is estimated by the railways and the Armour Company will be required, and are distributed to the various shipping stations after having been iced at the nearest icing stations. The peaches are loaded into the cooled car by the shipper under the supervision of the agents of the Armour Company. The number of tiers of 10 I. C. C. REF.

crates loaded is at the discretion of the shipper, subject, however, to the judgment of the agents of the refrigerator company, which requires that sufficient space be left unoccupied for the free circulation of air. The loaded cars are concentrated from the spur lines and brought together from the different stations on their way to the markets.

The transportation of Georgia peaches is undertaken upon a basis of 72 hours from Atlanta to Boston. Early in the season when but few peaches are offered full trains are not possible and in the case of the Southern Railway at least they are taken to Alexandria on practically passenger schedule, 17 to 18 hours Atlanta to the river, it being generally believed, that, if the first shipments are handled speedily and with great care, the effect upon the markets will be beneficial to the output of Georgia peaches for the whole season. The regular peach train schedule is followed as soon as it is practicable to make up solid trains. This schedule takes the trains from Atlanta to Alexandria in 28 hours, to Jersey City in 41 to 42 hours, and Boston in 72 hours. Practically the same schedule is followed in transporting the peach from Georgia points other than Atlanta and upon other defendant lines south of the Potomac. Full trains of peaches are possible only during the rush of the season. The fast schedule cannot be maintained south of the Potomac with trains of more than 10 cars. When there are not 10 cars of peaches for a train the train is filled out with merchandise other than peaches. Each car of peaches is iced several times *en route*, the last icing south of the Potomac being done at Alexandria and the last *en route* to Boston at Jersey City. Ten to twelve tons of ice are required to keep the fruit in condition on its journey. Generally speaking, the cars carry no return loads.

At Alexandria the cars are delivered over to the Pennsylvania, which takes them to Jersey City, at which point those for New York are floated across to Pier 39 for delivery there to the consignees.

The cars destined to Boston and other Eastern points are lightered from Jersey City to Harlem River, which consumes five hours, and, at the Harlem, are turned over to the New

York, New Haven & Hartford Railroad Company, which completes their transportation to the markets for which they are destined.

Rates from producing points in Georgia on the lines of the defendant railways vary in proportion to the distance, the rate from Atlanta to New York being 81 cents per 100 pounds. In cases in which the peaches are brought into main line stations from stations on spur tracks, arbitrary charges are added ranging from \$4 to \$10 per car.

The defendant railways in connection with their carload rates on peaches exact a minimum of 20,000 pounds on what are known as 36-foot cars and of 22,500 pounds on 40-foot cars. The loadings are determined by weights estimated per crate, and no extra charge is made for loading in excess of the prescribed minimums. The peach rates are based upon a valuation of \$500 per carload.

The railways south of the river have nothing whatever to do with the charges made by the railways north of the river (including the \$80 arbitrary Jersey City to Boston).

A comparison of the rates on peaches with the classification rates in force on the Georgia Central and connections from Fort Valley, Ga., to New York is as follows: Peaches, carloads, Fort Valley, Ga., to New York, 87 cents per 100, minimum as already given. Classification rates Fort Valley, Ga., to New York, N. Y., 1st class \$1.26, 2nd \$1.08, 3rd 95 cents, 4th 81 cents.

The expense of the special fast refrigerator service utilized in the transportation of Georgia peaches is heavy. Special terminal facilities and equipment are necessary. Old sidetracks have to be lengthened and new ones constructed. Extra stations must be established and maintained during the shipping season with a force of agents, telegraph operators, switchmen and freight handlers. Refrigerator cars must be leased and paid for at $\frac{3}{4}$ of a cent per mile traveled loaded and empty. These cars must be assembled or parked at convenient points and held there subject to order. Additional switching engines and switchmen are necessary for their movement. Each of these cars must be transported to the icing station before being

10 I. C. C. REP.

taken to the shipping point. The Southern Railway, during the peach shipping season, maintains four time schedules for freight traffic, as follows: Peaches, Georgia points to Alexandria, 28 hours, or 23 miles an hour; vegetables, 33 hours, or 19.4 miles an hour; fast freight, 43 hours, or 15 miles an hour; third class trains, 53 hours, or 12 miles an hour. The other defendants maintain fast schedules for the peach traffic similar to those of the Southern. But this time is not guaranteed nor is it always made good.

The record shows that the defendant railways have given the fruit business considerable care and attention. It is clear that even slight delays in transportation or carelessness in refrigeration may result in serious injury to the shipper.

Railway men do not agree as to the relative expense of running trains at different rates of speed. It is certain, however, that the operation of trains at high speeds entails increased expenditure and adds to the difficulties and dangers of railroading. Passenger locomotives are used in the peach traffic. Whereas on the slower schedules a locomotive south of the Potomac can haul a train of twenty or more cars, the time on the peach schedule on the same lines cannot be made with more than 10 cars. On the Pennsylvania lines the fast time cannot be made with more than 25 cars, whereas, were the schedule 10 miles an hour slower, 45 cars could be handled. The engine pulling 25 cars burns as much, if not more coal than the one pulling 45 cars. More men are required to operate these fast trains than the slower ones and the men are paid higher wages. Slower trains must be sidetracked often from one to two hours in order that the tracks may be cleared for the special fast trains.

As has been stated, it is only at the height of the peach shipping season that it is possible to depend upon a supply of loaded cars sufficient for full trains. At the beginning and towards the close of the season cars must be transported in passenger trains or as portions of a train usually of 10 cars, the remainder of which earn low rates of freight.

In the peach traffic every car must be iced five or six times. Each icing entails switching and delay, and, moreover, the rail-

way transporting the peaches hauls the ice without compensation, to an amount averaging 10,000 to 12,000 pounds per car.

The peach crop is not reliable as affording an estimable volume of traffic from year to year. If a factory or a mill doubles its capacity it may ordinarily be depended upon to double its output. Although the number of peach trees in Georgia has continually increased the fact is that the product of peaches has not increased in proportion. Investments in sidetracks and other special facilities for handling the traffic based upon the acreage in peaches or the number of trees planted have, therefore, not been as profitable as was expected. The rates for the peach traffic between Georgia points and the Eastern and Northern markets, the Boston arbitrary excepted, were fixed about 15 years ago. The railway traffic managers claim that in fixing these rates consideration was given to the fact that the peach industry was in its infancy and that heavy expense for land, planting, labor and advertising were incidental to it, and the rate was therefore placed at what they believed was a low figure under which the industry might be successfully developed. The rates to the Eastern markets with the exceptions of Boston and other New England points have remained practically the same, though there have been minor deviations in the case of the fruit originating on spur or auxiliary lines. In the case of Boston and other New England points the rates north of New York have been materially reduced, although the present arbitrary of \$80 to Boston is now complained of as being oppressive. The record shows that the railways held that the rates now in force are reasonable, if not too low, the exceptional nature of the traffic and the special fast service considered; that, while tentative rates granted to other embryo industries have been increased with the permanent establishment and profitable operation of these industries, the peach rates have not been advanced, although long ago the peach industry was firmly established; that the cost of railway operation, especially in the South, has increased, both labor and material being much higher than when the rates were put into effect, and it is claimed this fact should be considered in passing upon the rate complained of. The service rendered in the transportation of peaches has continually

10 I. C. C. REP.

improved. It is a much more efficient and satisfactory service than was rendered 10 years ago, and additional expense has attended every step towards improvement.

The record contains much testimony in regard to the provision of the peach tariff fixing minimums necessary to secure the carload rate per 100 pounds. As we have seen, the tariff fixes the minimum for the smaller cars at 20,000 pounds; for the larger 22,500 pounds. It is complained that, in order to obtain the minimum, it is necessary to load the peaches five tiers high, and that when five tiers are loaded the fifth tier rots in transit and the lower tiers are damaged thereby before reaching market; also, that, whereas the railways base their calculations of carload weights upon an estimate of 50 pounds to the crate, a fair average of the weight of crates is 42 pounds. In a 36-foot car 392 crates make four tiers and these 392 crates at 42 pounds weigh 16,464 pounds. In a 40-foot car 448 crates make four tiers and these 448 crates at 42 pounds weigh 18,816 pounds. The complainant asks that the minimums be reduced to these figures, 16,464 pounds for the smaller car and 18,816 for the larger.

It is also complained that, whereas the railways in fixing the minimums estimate the weight of a crate of peaches or plums at 50 pounds, a fair average of the weight of the crates is 42 pounds. Except in the matter of fixing the minimum it makes no difference what estimate is taken upon the weight of a crate, because no charge is made for transporting the excess above the minimums, no matter how heavily the cars are loaded. A carload of 392 crates at 50 pounds weighs 400 pounds less than the 20,000 minimum and at 42 pounds 3,536 pounds less. A carload of 448 crates at 50 pounds weighs 100 pounds less than the 22,500 minimum and at 42 pounds 3,684 less.

The railways are compelled to estimate the weight of the fruit for the reason that it is impracticable to have car scales at all the shipping points. Not all the Armour refrigerators bear stencilings of their tare weight and, if they did, these would not be trustworthy because the weights of the cars are continually changing, the tendency being for the cars to accumulate weight with age and moisture. Moreover, each car carries a quantity

of ice the exact weight of which it is not possible to determine. The record contains much widely varying testimony in regard to the actual average weight of the standard crate of peaches and the standard crate of plums. Of plums many crates are shipped along with the peaches, although no separate account of them is kept in the shipping records. Ten crates of peaches weighed at random from one shipment averaged 46½ pounds, the lowest weighing 42½ pounds. Another 10 crates similarly weighed averaged 46 pounds. One witness testified that in weighing many crates he had found none weighing as much as 44 pounds, the weights running from 38 to 42 pounds. Plums weigh 49 to 51 pounds per crate.

When a car of peaches is loaded it is closed tightly, the contents not being thereafter exposed to the outer air until the car is opened at its destination. The air in the car is cooled by passing downward through the ice in the ice bunkers. The peaches are generally quite warm when loaded and the mass of fruit gives off heat which must be overcome by the currents of cold air. Tests of temperature show that the cold air settles in the lower portion of the car, the upper portion being considerably warmer, although circulation is secured in the packing by leaving space for the movement of the air. As before stated, the complainant asserts that it is impossible to safely transport peaches when more than four tiers are loaded, the fifth tier and all above it being surrounded by air not sufficiently cold to preserve the fruit, and that the decay of the tier or tiers above the fourth affects all the rest. A number of witnesses who have been identified with the management of the peach traffic testified that very few complaints have ever been made of damage done to peaches by reason of loading above four tiers. One very extensive shipper has made it a rule to ship largely above four tiers. A number of fruit merchants and growers testified that in order to secure safe transportation but four tiers should be loaded. One leading peach grower and commission merchant stated that he has found it expedient and necessary to adopt the rule of shipping in four tiers exclusively, and has found it to his advantage and profit to pay higher freight rather than to

10 I. C. C. REP.

load above four tiers in order to secure the benefit of the minimum rate, and some others testified to the same effect.

Testimony also appears in the record that much of the damage incurred by the fruit in transit is caused by the fact that often a car is detained two days in the loading, being frequently opened, thus permitting the admission of warm air; also, by the fact that the fruit instead of being cooled before loading is taken direct to the car from the tree and upon its journey to the car is subjected to the rays of the Southern sun. It is also claimed that diseases incident to the ripening of the peach at some times and in some sections are incipient in the fruit when it is loaded, and are developed in transit despite the most perfect refrigeration.

The defendants claim that experience has shown that peaches can be shipped safely in five tiers or even in more than five. Records of the traffic on various roads placed in evidence show that the great bulk of the peach movement from Georgia is and always has been in carloads weighing largely above the minimum and hence that the general loading is largely above four tiers. It is claimed that, if the damage which it is asserted attaches to transportation of more than four tiers actually occurs, the peach growers would not load the cars above the minimum and that there would be a general and emphatic complaint, which there has not been.

Exhibit B attached to the record is a statement of all cars of Georgia peaches handled by the Southern Railway during the season of 1903, moving all-rail via the Central of Georgia to Atlanta and thence by the Southern to Alexandria. A large majority of the cars originated at Fort Valley and Marshallville, the remainder being from many other points in the Georgia Central territory; the exhibit also includes all cars moving during the season of 1903 from Georgia Southern & Florida Railroad stations all-rail to Macon, and thence via the Southern Railway to Alexandria.

This exhibit shows the movement of 527 carloads of peaches. Of these, 265 were billed at 20,000 pounds. As has been shown, there are 392 crates in a 36-foot (or 20,000 pound minimum) car. Of the 265 cars of this class billed at 20,000

pounds, 252, or above 95% of the cars contained more than 392 crates and only 13 cars contained 392 crates or less. Two hundred and sixty-two cars of the 40-foot class were billed at 22,500 pounds. Of these, 214, or above 81% contained more than 448 crates, the four tier loading of this class; while only 48 cars contained 448 crates or less. The 527 cars of both classes contained 245,152 crates or an average per car of 465 crates which is 17 crates per car more than the four tier loading for the largest size or 40-foot car. In this exhibit are found records of cars containing the following numbers of crates: 609, 603, 588, 562, 560, 557, etc.

An exhibit filed by the Central of Georgia showing the peach movement during 1903 to all points East and North is similar to that filed by the Southern. In this it is shown that carloads billed at 22,500 pounds contained as many as 672 crates, 560 crates, 562 crates, etc.; carloads billed at 20,000 pounds contained as high as 588 crates. Very few of the cars contain loadings of four tiers or less. Similar statements of fruit movement by the Georgia Central for the years 1902 and 1901 show the same practices in loading, as to number of tiers.

The Michigan Central has a peach minimum of 20,000 pounds; Pere Marquette 20,000 pounds; lines carrying from Texas points 20,000; lines from California points 24,000. The Pennsylvania makes a minimum of 28,000 for peaches originating on its lines, 20,000 for Georgia traffic. On nearly all of these lines refrigeration is practiced, though the quantity of ice generally averages less than in the Georgia traffic.

Fifty carloads of peaches billed at 20,000, a total loading of 1,000,000 pounds, contained 25,244 crates, or an average of 504.8 crates per car. In this instance, estimated at 50 pounds per crate, the actual weight of the loading of the 50 cars was 1,262,200 pounds, an excess of 262,200 for which no freight was paid, or about 13.1 carloads of 20,000 pounds. Estimating a crate at 42 pounds, the excess carried in the 50 cars above the minimum was 60,248 pounds, or a little more than 3 carloads. Upon the 42-pound basis the shipper got the use of practically 53 cars and paid freight on only 50.

It is manifest that it is by no means the unanimous judgment
10 I. C. C. REP.

of the shippers that it is unsafe to load over four tiers high. If a car on which 81 cents per 100 pounds is paid contains, say, 600 crates of peaches and it is estimated that the peaches weigh 42 pounds per crate, the rate per 100 paid by the shipper is but 65 cents. As a matter of fact, the rates secured to peach shippers, by loading above the minimum, no charge being made for the excess, are materially less than the rates ostensibly applied to the traffic in question.

The proportion of dead weight to the weight which pays freight is greater, perhaps, in the peach traffic than in any other, and especially is this true of Georgia peach transportation because no other traffic necessitates the hauling of so much ice. Armour refrigerator cars are very heavy. Their tare weight when the cars are new ranges from 31,900 to 34,800, and the cars grow heavier with use. Taking 31,900 pounds as the minimum tare weight of a 36-foot car and adding 12,000 pounds as the average weight of ice in the bunkers during transportation, the revenue-paying weight, 20,000 pounds, is 31 per cent of the total. In the case of the 40-foot car the revenue-paying weight is 32.5 per cent. As compared with this a car holding 60,000 pounds of grain weighs 90,000, so that the revenue-paying weight is $66\frac{2}{3}$ per cent of the gross weight. In the case of coal, pig iron, etc., the proportion of revenue-paying weight is even greater than in the case of grain. There is less dead weight in the transportation of fresh meats in refrigerators than there is in peach traffic; also, less on nearly all, if not all kinds of classified merchandise. In the transportation of beer in refrigerators the carriers allow for only 4,000 pounds of ice whereas 12,000 is carried free with peaches. In the shipping of dressed meats the carriers are paid for every pound in excess of the minimum, the actual weights being furnished by the shippers from their books.

George R. Knox, General Freight Agent of the Nashville, Chattanooga & St. Louis and the Western & Atlantic, testified that a locomotive rated at 800 tons tractive power on ordinary freight schedules is rated at only 700 tons when pulling a train of refrigerators on the peach schedule. Taking into consideration the relative proportions of dead weight the results as to ex-

pense in the operation of traffic in peaches and the slower traffic are as follows in a given case. Two locomotives of equal capacity start together, one pulling a train of grain, the other a train of peaches. The locomotive rated at 800 tons pulls 470 tons paying freight of grain at low speed, while the locomotive on the fast train of peaches rated at 700 tons hauls less than 235 tons of paying freight. This calculation shows that it costs a little more to move one ton of peaches than it does to move two tons of grain.

No other class of freight is so highly perishable as peaches. Vegetables and watermelons are generally shipped without ice in ventilated cars and are not so susceptible to damage through delay as peaches. Oranges are generally shipped with some ice, but it is merely for the purpose of preserving a uniform temperature, and oranges do not so speedily decay.

The Georgia peach market sales take place in the different cities at different hours and the fruit must be at each market when the hour of sale arrives. It is therefore a necessity of the traffic that the fast trains conveying the peaches shall be uniformly on time. If a train is late an hour or two at New York the fruit for that city market must lie over a day and be subjected to a reduction in price. The same is true of other destinations. For instance, the hour of sales in Baltimore is 1 p. m., except Monday, when it is 9 a. m.; Philadelphia, midnight; Newark, N. J., 2 a. m.; New York, midnight at pier No. 39, to which the peaches are floated from Jersey City; Buffalo, 2 p. m.; Pittsburg, 5 a. m.; Boston, 2 a. m. The responsibility is especially severe upon the carriers south of the river upon whose performance of schedule time depends the making of connections with lines north of the river, affecting the distribution of peaches throughout a vast territory supplied by Washington, Baltimore, Philadelphia and Boston.

The carload rate on peaches from
Fort Valley, Ga., to Western cities is as follows:

To Cincinnati,	Distance 581 miles.....	47c.
“ E. St. Louis,	“ 711 “	58c.
“ Indianapolis,	“ 692 “	59½c.
“ Chicago,	“ 838 “	64c.

Macon, Ga.,

To Cincinnati,	Distance 544 miles.....	40c.
“ E. St. Louis,	“ 694 “	51c.
“ Indianapolis,	“ 676 “	52½c.
“ Chicago,	“ 822 “	57c.

Atlanta, Ga.,

To Cincinnati,	Distance 476 miles.....	40c.
“ E. St. Louis,	“ 606 “	51c.
“ Indianapolis,	“ 587 “	52½c.
“ Chicago,	“ 733 “	57c.

The carload rate on peaches from Fort Valley, Ga., to Eastern cities is as follows:

To Baltimore,	Distance 720 miles.....	84c.
“ Philadelphia,	“ 815 “	87c.
“ New York,	“ 908 “	87c.

Macon, Ga.,

To Baltimore,	Distance 691 miles.....	78c.
“ Philadelphia,	“ 786 “	81c.
“ New York,	“ 879 “	81c.

Atlanta, Ga.,

To Baltimore,	Distance 690 miles.....	78c.
“ Philadelphia,	“ 795 “	81c.
“ New York,	“ 875 “	81c.

The rates from Marshallville, Ga., to these points are substantially the same as given above.

From the foregoing figures it is seen that the rates on peaches from Georgia points to Western cities are materially lower than the rates from the same points to Eastern destinations.

The Western rates, it is said, were made in order to divert, if possible, a portion of the Georgia peach traffic to Chicago, Cincinnati and other cities and to create a demand for the fruit in the territory in those localities. These rates were based upon a charge of 40 cents from Macon to Cincinnati. The tariff beyond the Ohio was formed by adding to this basis the rates from Cincinnati. The defendant railways had nothing to do with the rate-making beyond the river.

The Georgia peach has but insignificant competition in the East. It is earlier than the products of Maryland, Delaware

and Connecticut and does not meet the peaches of these regions in the markets until quite late in its own season when most of the Georgia product has been sold. The earlier peaches of the West, as well as those of Texas and other distant Southwestern States, are largely absorbed by markets nearer than the Eastern cities, and their appearance in the East is hindered by the lack of special refrigerator service such as is given to the Georgia fruit. The California peach is more or less in evidence and the demand for it is extensive and reliable. In the West the Georgia peach enters into competition upon fairly equal terms with peaches from Illinois, Indiana, Ohio, Colorado, Missouri, and other productive fields, a large proportion of whose yield is marketed during the season of the Georgia fruit, and it also meets in that section the competition of peaches from California.

The Eastern market is more attractive to Georgia growers than the Western for good reasons in addition to the absence of strong competition. The population is denser in the East and the peach markets are not so easily glutted there as in the West. Prices are generally higher than in the West.

The service in the movement of peaches from Georgia points to destinations north of the Ohio differs radically from that which prevails in the traffic to the East. Whereas, in the latter special fast schedules are provided for the transportation of the fruit in full trains of refrigerator cars from the field of origin through to Boston, in the case of shipments across the Ohio the special fast service ends at Atlanta. From that point onward the refrigerator cars are moved as parts of regular freight trains, making no faster time than other merchandise not of a perishable nature. Peaches originating at and shipped from Atlanta to points north of the river receive no special service whatever. The difference in the service to the East and that to the West is illustrated by the following. Solid trains of peaches are run from Atlanta to New York, 875 miles in 72 hours, while the 733 miles from Atlanta to Chicago consume 96 hours. The conditions of the fruit trade in the West, including the market regulations which are entirely different from those of Eastern cities, are such that special service required for Eastern traffic is not demanded in the West.

Notwithstanding the relatively low rates applied to the Georgia peach traffic to Cincinnati and beyond, and the efforts of the railways and fruit growers to encourage a movement across the Ohio to the North and West, shipments in this direction have not assumed important dimensions.

One condition of the carload rate on Georgia peaches is that the rate shall apply only when the value of the carload is limited to \$500. It is provided that upon a valuation of from \$500 to \$750 the rate shall be increased 20 per cent; \$750 to \$1,000, 40 per cent; \$1,000 to \$1,250, 50 per cent; above \$1,250 a special contract is required. The fixing of the \$500 valuation as a condition of the carload rate followed an accident which occurred early in the history of the transportation of Georgia peaches in refrigerator cars. Some of the refrigerator cars in use at that time were top-heavy when loaded and iced. A train containing a number of such cars was derailed with the result that a loss of \$5,000 was sustained by the carrier. The cars now used in this traffic are not of the top-heavy type and it is shown that accidents resulting in serious loss are not numerous.

The arbitrary rate of \$80 per carload charged by the New York, New Haven & Hartford Railroad Company between New York and Boston was the principal subject of investigation at an adjourned hearing in Boston. While the rate on peaches from Georgia points to New York City is based on a rate of 81 cents per 100, or \$162 per carload for the haul of 1150 miles, the New York, New Haven & Hartford for the haul of 228 miles from the Harlem to Boston exacts an arbitrary of \$80 per car, or almost one-half as much as the charge from the shipping point to New York, although this company transports the fruit only about one-fifth of the total distance. In New York the peaches are unloaded by the railways, in Boston by the consignees. Were the rates south of New York similar to the Boston arbitrary it would cost to ship a carload of peaches from Macon to New York about \$240 instead of \$162.

Strawberries shipped from the South to Boston are carried by this company from New York to Boston under a proportion or

division of a through rate and the record shows that the carrier pays more attention to the strawberry traffic than the peach, although the latter pays the higher rate.

The service furnished by the road is, to say the least, no better than that furnished by the lines south of New York. The peaches for Boston and other Eastern points arrive in Jersey City during the night. They are loaded on floats which leave the Jersey City terminal of the Pennsylvania at 1 A. M. Five hours thereafter they reach the New York, New Haven & Hartford at the Harlem River. The basis of the peach service to Boston is train 80 leaving Harlem River at 3 P. M. with 35 to 38 cars and one engine, and due to reach Boston at 3 the next morning. There is no icing *en route*, the last icing being done at Jersey City. The service of the Pennsylvania ends when the cars are placed on the floats. In case of delayed cars a special is made up for Boston which takes the delayed peaches and enough other freight to make up a train. Despite these fast trains there are some delays and losses therefrom, there having been more complaints the last season than in former years.

Before the New York, New Haven & Hartford acquired the Old Colony Line, the rate was \$130 per car from New York to Boston. When the Old Colony was acquired, the rate was reduced from \$130 to \$100 for 24,000 pounds minimum, and later reduced to the present rate, arbitrary \$80 for 24,000 minimum. In the Official Classification the rate is 48 cents per 100, or \$96 per car. The traffic in Georgia peaches between New York and Boston is not of the large and steady volume which characterizes the traffic on the roads south of New York, and is, therefore, proportionately more expensive. In 1903 the New York, New Haven & Hartford got 8 cars of peaches to Boston in June, 38 in July, 3 in September and none in October. Some Western beef is hauled in this fast "perishable" train with peaches and other perishable merchandise, and on these cars other than peaches a pro-rate is made. The volume of beef, however, is constant and steady throughout the year working out a fair revenue which the railway people claim could not be done with the peach traffic if it were pro-rated. While peaches pay \$80 per car from Harlem River to Boston only \$30 per car is paid

10 I. C. C. REP.

upon beef, on which the minimum is a little less than on peaches. The time and mileage are approximately the same in both lines of traffic and in both the refrigerator cars go back empty. Strawberries come to New York by water and they are pro-rated to Boston, the rate being based on competitive conditions from the South to Providence and Boston. Sometimes the strawberry traffic is better than the peach. Peaches must be delivered in Boston at 6:30 A. M. and the cars must be on the tracks at 5:30. The volume of the peach trade in Boston is ended by 9 A. M. Two and one-half millions of people are tributary to the market within a radius of 50 miles. If a train arrives after 9 A. M. there is a loss of from 25 cents to 50 cents per crate on the peaches.

The claim made by complainant that a reduction in the arbitrary rate of \$80 would work a large increase in the demand for peaches in the Boston market and in other Eastern cities is denied by the defendants who introduced testimony to the effect that the difference in the rates would not be manifest in the price of the fruit.

The New York, New Haven & Hartford for some years past has originated a growing traffic on peaches grown in Connecticut. In the season of 1902, practically the month of September, that road took 28 carloads of average weight 15,300 pounds, from Yatesville, Conn., to Boston on which the average earning was \$50.48 per car, shipped in refrigerator cars, distance 170 miles. If the minimum were increased to 24,000 per car and the receipts increased in that proportion the rate would be a little higher for the Connecticut peaches than that received from the Georgia fruit. The minimum in the case of the Connecticut peaches was placed at 10,000 for the reason that the orchards were new and the growers had to ship daily as the fruit ripened. It was a commercial necessity and was resorted to to encourage the new industry.

CONCLUSIONS.

We conclude, from the foregoing statement of facts, that the regulation of defendants, whereby the freight rate on peaches and other fruits from Georgia points is increased in proportion

to the valuation placed by the shipper upon each carload of fruit, is unreasonable, unjust and in violation of the Act to regulate commerce. The value of one carload of peaches does not materially differ from that of another, and this slight difference in value affords no justification for a variation of the rate. We hold that, if the fruit is damaged through the negligence of the carrier while in transit, there is no reason why the carrier should not be required to respond in damages to the full amount of the injury sustained, without regard to the valuation placed upon it. Such a requirement can do no possible injustice to the carrier, as the extent of damages can be readily ascertained and the damages recovered would in every instance be fixed by the amount of damages sustained.

The arbitrary charge of \$80 per car imposed by the New York, New Haven & Hartford Railroad Company on the carriage of Georgia peaches and other fruits from New York to Boston, is in our judgment, grossly excessive and out of proportion to the rate imposed by other carriers in other sections of the country for performing a like or equal service.

That this rate is excessive is made apparent when we consider that the haul from New York to Boston is part of a through service and should be so treated in the adjustment of rates. We, therefore, hold that this \$80 arbitrary, per car, New York to Boston, is unreasonable, unjust and in violation of the Act to regulate commerce. In the view we take of the case \$50 per car would be a just and reasonable charge for this service.

Considering the expensive service rendered by the carriers in the transportation of peaches from Georgia points to Eastern markets, as shown in the foregoing statement of facts, we do not feel justified in condemning the rate per hundred pounds, carloads, from Georgia points to New York, based upon a rate of 81 cents per 100 pounds from Atlanta to New York. This rate can be reduced either by lowering the rate itself or by reducing the minimum carload. The peaches are shipped in crates, and it is insisted by complainant that no more than four tiers of these crates can safely be shipped in a car for the reason that, owing to imperfect refrigeration in the upper portion of the car, fruit above the fourth tier is liable to rot, which not only re-

10 I. C. C. REP.

sults in injury to the fifth and sixth tiers, but, through infection from these tiers, causes damage to the lower tiers. It is insisted, therefore, that the present minimum carload should be reduced so that the present rate per hundred pounds can be secured on a loading of only four tiers.

In reply to this contention it is clearly shown by the exhibits submitted by the carriers that in the shipment of peaches from Georgia points to New York, and other Eastern Markets, especially for the year 1903, the loading in a great majority of instances is greatly in excess of the minimum. Of cars of the smaller size 95% are loaded above the minimum, while of the cars of the larger size 81% are loaded above the minimum. It should be borne in mind that all weight above the minimum is carried free by the roads. This fact it may be readily understood is a constant inducement for shippers to load the cars not only above four tiers, but also greatly in excess of the prescribed minimum. Should we lower the present minimum, the result would be an increase in the volume of this non-paying freight which the roads would be compelled to carry. This, it seems to us, would be unjust in view of the fact that the carriers, from the nature of the business, are required to carry ten to twelve thousand pounds of dead freight in the way of ice utilized in refrigeration. The fact that most of the cars are loaded above the minimum affords some proof that, in the judgment of those engaged in peach culture, this product, when so loaded, can be shipped in comparative safety.

Complainant insists that the rate of 60 cents from Atlanta to Charlottesville shall be reduced so as to conform to the rates now prevailing from Atlanta to the Western markets. The rate from Atlanta to Charlottesville is merely a means adopted for convenience in arriving at the entire through rate, and fixing the divisions of that rate. The through rate from Atlanta to New York is made as follows: Atlanta to Charlottesville 60 cents; Charlottesville to New York 21 cents, making a total of 81 cents, Atlanta to New York.

Inasmuch as the public is interested in the through rate only, the Commission has repeatedly held that it has nothing to do with the division of the published through rate. While it is

10 I. C. C. REP.

true that the rate from Atlanta to Charlottesville is out of proportion (distance alone considered) to the rate from Charlottesville to New York, it should be remembered that the originating line usually receives a larger proportion of the through rate than is awarded to the line completing the haul, for the reason that the initial carrier not only originates the freight but also incurs the expense of loading and other like burdens.

It is complained, also, that the rates to the East are out of proportion to the rates to Chicago, Cincinnati, St. Louis and other Western markets. By reference to the finding of facts it will be seen that the service utilized in the carriage of peaches to Western markets is much slower and in other ways greatly inferior to the facilities furnished by the roads reaching the Eastern markets; moreover, it is shown by the record that the low rate to the West was made in order to meet competitive conditions.

There has never been an active demand for the Georgia peach in the Western markets and it appears that the low rate to the West was made in order that the demand might be increased, and the Western roads thereby enabled to participate in this traffic. Notwithstanding these low rates, however, the great bulk of the Georgia fruit has continued to move to the East rather than to the West. All the circumstances and conditions surrounding shipments to these respective markets are so dissimilar that but little aid can be derived from a comparison between them. The conditions which should be considered in fixing these rates have been so fully covered by the statement of facts that any further discussion of them seems to us unnecessary.

The quality of the service rendered by defendants in the transportation of peaches and other fruits from Georgia points to Eastern markets seems to be satisfactory. That this service is a very costly one to the carriers, involving as it does fast time, prompt delivery at point of destination, the carriage of a large amount of non-paying freight, the return of the cars to the South without loads, and many other conditions rendered necessary by the highly perishable nature of the traffic, cannot be successfully disputed. In view of these considerations

10 I. C. C. REP.

we cannot say that the established rate is so excessive as to call for condemnation. Nor do we feel justified in saying that the established minimum is unjust or unreasonable. We reach this conclusion after giving due consideration to the difficulties and dangers incident to the production and shipment of this highly sensitive and perishable fruit and the fact that when loaded to or above the minimum some damages are liable to occur.

It is apparent that the peaches before being placed in the cars are not sufficiently cooled and consequently they give off quantities of heat, thus neutralizing in part at least the refrigeration provided. It seems to us if some means could be adopted for cooling the fruit before shipment, the cars might be loaded practically to their capacity without incurring serious loss. However, this is a matter the arrangement of which must be effected, if at all, by the shippers and the carriers themselves.

An order will be issued directing that the defendants shall cease and desist from the practice of increasing the rate on the carriage of peaches from Georgia points to New York and other markets in proportion to the valuation placed upon the carload by the shippers thereof; and directing that the New York, New Haven & Hartford Railroad Company cease and desist from charging an arbitrary of \$80 per car on Georgia peaches and other fruits from the City of New York, New York, to Boston, Massachusetts.

that he institutes this proceeding in behalf of himself and others.

That the defendants, the Atlantic Coast Line Railroad Company and the Louisville & Nashville Railroad Company, exact the following charges per 100 pounds for transporting cowpeas in carloads to New Orleans; from Darlington, Florence, and Sumter, South Carolina, 38 cents, and from Bennettsville, S. C., 40 cents.

That cowpeas are shipped in large quantities from South Carolina and other southeastern states to points in Louisiana for fertilizing purposes and should take rates as low as rates established for other kinds of fertilizers; that defendants by exacting charges for the transportation of cowpeas as already stated, are subjecting complainant and others to unjust and unreasonable rates, unjust discrimination and undue and unreasonable prejudice and disadvantage.

In their joint and several answer the defendants admit that the rate on cowpeas, in carloads, from Darlington, Florence, Sumter and Bennettsville, S. C., is as set forth in the petition except that, from Sumter, S. C., the rate to New Orleans, via the Louisville & Nashville Railroad and its connections, is 44 cents and not 38 cents; admitting, however, that from Sumter, S. C., to New Orleans, La., a rate of 38 cents per 100 pounds is available via the Mobile & Ohio Railroad or the Illinois Central Railroad.

Defendants admit that cowpeas are shipped in large quantities from South Carolina and other southeastern states to points in Louisiana; that cowpeas are planted for purposes of soil improvement and may, therefore, in a sense, be said to be used for fertilizing purposes; but deny that, considering the manner in which they are used for such purposes, they should be classed with fertilizers or that rates should be applied on them as low as rates which apply on fertilizers; allege that, in addition to the use of cowpeas for purposes of soil improvement, they are used extensively as food for cattle and by many people as an edi-

ble, which uses further differentiate the traffic in cowpeas from that in fertilizers; and aver that no shipments of fertilizers are made from Darlington, Florence, Sumter, or Bennettsville, S. C., to New Orleans or other points in Louisiana, and that no through rates on fertilizers are in force between said South Carolina points and Louisiana points.

FACTS.

The cowpea possesses the power of taking nitrogen from the air and adding it to itself, so that when the vine is turned under with the plow, or its roots are left in the ground, nitrogen is added to the soil, which is thereby enriched to the extent of 100 to 200 pounds of nitrogen per acre, in addition to a quantity of fertilizing matter of organic nature.

In the culture of cotton and sugar cane it is necessary to rotate the crops. Each third year fertilizer must be furnished to give back to the soil that which has been removed from it. Especially is this true of land devoted to the producing of sugar cane and cotton. It is estimated that not less than 500,000 bushels of cowpeas are used each year for this purpose in Louisiana, of which 98 per cent are used in the sugar district; and that 100,000 acres of the vines are turned under in the State annually. Clover turned down by the plow is a strong fertilizer, but it takes two years to do its work, whereas the cowpea takes but one.

The seed cowpeas are bought in Tennessee, South Carolina, North Carolina and other southern states. They are not raised in Louisiana. The Louisiana planters do not cultivate the plant for the seed but for the vine, and they buy seed peas of that variety which will produce the greatest quantity of vine.

The vines of the cowpea are used to some extent as forage, but the use of the plant for this purpose has been largely superseded within the past few years by alfalfa, which possesses several advantages over the pea. Charles Godechaux, who cultivates 20,000 acres, the largest sugar plantation in the State, saves for forage from 25 per cent to 30 per cent of the yield of cowpea vines upon his place.

10 I. C. C. REP.

The Louisiana sugar planter generally sacrifices the feeding value of the cowpea to get the benefit in making a crop of cane, which he best accomplishes by plowing under the vine. However, outside of the region where cane, cotton and rice are the principal crops, cowpea hay is fed to greater or less extent almost everywhere, and the manure returned to the field and used as fertilizer.

Cowpeas are nutritious food for stock when fed like grain, but so long as the peas are worth much more than corn, oats and other grains their use for stock feeding is precluded on the ground of economy.

Cowpeas are used to some extent as an article of table food by both whites and negroes in Louisiana, and more generally perhaps in other states, but cannot be regarded as a staple.

Cowpeas move from points in South Carolina to New Orleans on a blanket rate of 38 cents per 100 pounds; from North Carolina points to New Orleans 40 cents per 100. Fertilizer rates are published from Charleston, but not from the points mentioned in the complaint. If fertilizer were offered to the Atlantic Coast Line from the points mentioned in the complaint to New Orleans, rates would be made by combining rates to and from junction points carrying fertilizer rates.

On combination with Charleston rates from the points mentioned in the petition to New Orleans would be as follows: Darlington, 28 cents per 100; Florence, 27½ cents per 100; Sumter, 27 cents per 100, and Bennettsville, 29 cents per 100.

In comparison with the rates now applied to cowpeas the charge for their movement as a fertilizer to New Orleans would be as follows:

	As Fertilizer.	Present Rate.
Darlington.....	28c.	38c.
Florence.....	27½	38
Sumter.....	27	38
Bennettsville.....	29	40

The rate on cowpeas and the rate on corn, carloads, to New Orleans is as follows:

10 I. C. C. REP.

From	Cowpeas.	Corn (Class D).
Darlington	38c.	37c.
Florence	38	37
Sumter	38	37
Bennettsville	40	37

It was testified by the general freight agent of the Atlantic Coast Line south of Charleston that, previous to this complaint, he had never known of a request from any shipper at a South Carolina point for a commercial fertilizer rate on cowpeas.

The Louisville & Nashville Railroad for its lines issues a classification applicable on traffic originating at or destined to points on its line on cowpeas making it the same as class D. Their agent testified respecting this matter that, in fixing this rating for itself, the road felt it was probably better to arrange the matter by classification than by special commodity rate; and in making the calculation as to what it considered would be proper to fix on cowpeas it found that the class D rate would approximate the just rate.

Some of the defendants' witnesses affirm that cowpeas should take a higher rate than class D for the reason that class D is applied on commodities that are very much cheaper than cowpeas. For instance, corn which is in class D delivered at Savannah is worth 69 cents per bushel and oats 54 cents, while at the same market cowpeas are worth about \$1.50 per bushel.

The difference in value between cowpeas and commercial fertilizers is quite large. While cowpeas are worth at New Orleans from \$3.30 to \$4.15 per 100 pounds, commercial fertilizers are worth from 75 cents to \$1.00 per 100.

Rates to New Orleans on cowpeas from Tennessee points are much less than from the Carolinas, but this fact is accounted for in part at least by the fact that the distance from Tennessee points is much less.

Defendants have made low rates on fertilizers from Savannah to points in Georgia and from Jacksonville to points in Florida and from Charleston to points in South Carolina to enable farmers to secure fertilizers cheap so that the railways might reap the benefit of the increased production. The Atlantic Coast Line does not participate in the movement of products from New

10 I. C. C. REP.

Orleans and, therefore, does not make a low rate on fertilizers to New Orleans, nor on cowpeas.

The rate on cowpeas from Charleston to New Orleans is 24 cents, being lower than the rate from Charleston to interior points, which results from the competition of the Clyde Line of steamers to New York and the Morgan Line to New Orleans.

In the Southern Classification cowpeas in carloads are in the 6th class, and less than carloads in the 5th class. When these rates were made, it was assumed, according to the testimony of witnesses for the defendants, that the peas would move in carloads; but as a matter of fact, they do move largely in less than carload lots. The minimum under the classification is 24,000 pounds, and of 30 cars shipped from various points to New Orleans, 16 cars were loaded under the minimum.

To produce the pea vine to be used as a fertilizer, from one and a half to three bushels of cowpeas, weighing from 90 to 180 pounds, are sown to the acre. When the standard commercial fertilizer, cottonseed meal, is used, from 1,300 to 1,400 pounds are applied to the acre. As much as 20 tons of vines have been cut from one acre sown with cowpeas.

CONCLUSIONS.

On the facts appearing in this record we cannot agree with the complainant that, in the adjustment of freight rates, cowpeas should be classed as a fertilizer. It is true that in many sections of the country, especially in the State of Louisiana, this product is used for soil improvement. Its use, however, is similar to that of clover and other grasses—it is first sown and then turned under by the plow. It is never applied to the soil as is done in the case of the well-recognized fertilizers of the country and, if the cowpea is to be treated as a fertilizer, we see no reason why clover seed should not be classified in the same way.

Speaking from general knowledge one bushel of clover seed will sow from six to eight acres of land and, if this article should

be treated as a fertilizer in rate making, the revenue derived by the carrier would be inconsiderable in comparison to that received for carrying a commercial fertilizer sufficient to enrich an equal amount of ground. This reasoning will apply with almost equal force to cowpeas. On an average 120 pounds of peas are spread upon one acre of ground which frequently produces twenty tons of vines. These vines are turned under and in this way utilized as a fertilizer. Cottonseed meal, one of the commercial fertilizers, is used quite extensively in the State of Louisiana and frequently from 1,300 to 1,400 pounds of it are spread upon a single acre. Thus it will be seen that the planter can afford to pay a higher rate on cowpeas used in the process of enriching his land than he can afford to pay upon commercial fertilizers; while, on the other hand, the carriers would derive inadequate revenue from the carriage of this product if the peas should be treated as a fertilizer in rate making, as complainant insists they should be.

There are other facts, however, which still further distinguish cowpeas from fertilizers in general use. The vine is used as fodder in stock feeding quite extensively throughout the southern states; and the pea itself is consumed by many as an edible and its use as food is quite general. Again, the value of cowpeas per hundred pounds is greatly in excess of that of the general fertilizer, a fact which should be considered in fixing rates.

In view of these considerations we feel that we cannot in justice comply with this prayer of complainant's petition.

The Louisville & Nashville and some other roads have by their tariffs placed cowpeas in class D. This is the class that carries the grain rate in the Southern Classification territory and is one cent lower per hundred pounds than the rate applied on cowpeas from South and North Carolina points to New Orleans. One of the traffic officials of the Louisville & Nashville testified that he considered the rate established by his company equitable and just. If this rate is reasonable and just for that road, we see no reason why it should not be equally so for defendant carrying this product from Carolina points to New Orleans.

It is our conclusion, therefore, that the other defendant, the Atlantic Coast Line, should place cowpeas in class D and that

10 I. C. C. REP.

the present rate applied by that company is unreasonable and unjust and violative of the Act to regulate commerce.

An order will be issued in accordance with the views herein expressed.

10 I. C. C. REP.

No. 620.

THE ABERDEEN GROUP COMMERCIAL ASSOCIATION

v.

THE MOBILE & OHIO RAILROAD COMPANY.

Decided June 25, 1904.

1. Defendant is justified in making a lower scale of charges on freight articles from St. Louis, Mo., East St. Louis and Cairo, Ill., to Mobile, Ala., Meridian, Miss., than for the shorter distances to Tupelo, Aberdeen, Columbus, West Point and Starkville, Miss., by actual and controlling competition which creates substantial dissimilarity in the circumstances and conditions affecting transportation.
2. Defendant's rates on freight articles generally from St. Louis, East St. Louis and Cairo to Tupelo, Aberdeen, Columbus, West Point and Starkville are not found as a whole to be reasonable and just, nor on the other hand to be altogether unreasonable, but upon the facts of the case its rates upon grain and grain products are unreasonable, unjust and unlawful and should be reduced.

John M. Allen, J. G. Millsaps and Benj. McFarland for complainant.

R. P. Williams, E. L. Russell and Ed Baxter for defendant.

REPORT AND OPINION OF THE COMMISSION.

YEOMANS, *Commissioner*:

The complainant claims that the rates charged by the defendant for the transportation of freight from St. Louis, Missouri, East St. Louis and Cairo, Illinois, to Tupelo, Aberdeen, West Point, Starkville and Columbus, Mississippi, hereinafter designated I. C. C. REP.—19.

nated as the "Aberdeen Group," are higher than the rates charged by defendant from the same points to Meridian, Mississippi, and Mobile, Alabama, points of greater distance in the same direction and on the same line of railway, in violation of the provisions of the fourth section of the Act to regulate commerce. That the said rates charged from said points of origin to the Aberdeen Group are unjust and unreasonable, generally and relatively, as compared with rates charged by defendant upon like traffic to Meridian and Mobile, and that complainant and others residing in the Aberdeen Group of towns are thereby subjected to unjust discrimination and undue and unreasonable prejudice and disadvantage; and that Meridian and Mobile, and the merchants, manufacturers, dealers and shippers at said points and their traffic are given undue and unreasonable preference and advantage. That the rates charged by defendant for the transportation of freight from the Aberdeen Group to points in the surrounding territory are unjust and unreasonable, generally and relatively, as compared with rates charged by defendant for like services in the transportation of like property from St. Louis, East St. Louis, Cairo, Mobile and other points, by reason of which complainant and the Aberdeen Group are subjected to unjust discrimination and undue and unreasonable prejudice and disadvantage. That the rates charged and exacted upon traffic above described between the points named are unlawfully maintained by joint agreement between defendant and other common carriers by rail competing with it for traffic over their respective lines.

Complainant asks that the Commission make an order commanding defendant to desist from said violations of law and from charging complainant and the Aberdeen Group any other than the lawful rate.

The defendant admits charging higher freight rates to the Aberdeen Group from St. Louis, East St. Louis and Cairo than are charged to Meridian and Mobile, but denies that such rates are a violation of law; defendant also admits charging higher rates from the Aberdeen Group to points in surrounding terri-

tory than are charged from St. Louis, East St. Louis, Cairo and Mobile to points of similar distance in surrounding territory, but denies that such rates are unjust or unreasonable or in violation of law; defendant also denies that complainant or the Aberdeen Group are subjected to unjust discrimination or undue or unjust prejudice or disadvantage by reason of any of the acts complained of.

FINDINGS OF FACT.

The complainant in this case, whose principal office is in West Point, Mississippi, is an association of commercial bodies or organizations of Tupelo, Aberdeen, West Point, Starkville and Columbus, Mississippi, the membership of which constituent commercial organizations are merchants, manufacturers, dealers and shippers at the places named.

The defendant is a common carrier by railway engaged in interstate traffic and operates the shortest line of railway from St. Louis, East St. Louis and Cairo to said Mississippi towns known as the Aberdeen Group, and Meridian, Mississippi, and Mobile, Alabama, where its general offices are located.

Tupelo is located at the crossing of the Mobile & Ohio, and the Kansas City, Memphis & Birmingham (otherwise called the "Frisco Line"). Aberdeen has three lines of railway, the Mobile & Ohio, the Frisco and the Illinois Central. West Point has three lines of railway, the Mobile & Ohio, the Illinois Central and the Southern, by which it has direct communication with the Mississippi River at Greenville, 150 miles distant. Columbus has two railway lines, the Mobile & Ohio and the Southern; it is located 400 miles above Mobile on the Tombigbee River, which is navigable for boats for from three to seven months of the year, and sometimes all the year. Starkville has two railway lines, the Mobile & Ohio and the Illinois Central. The Agricultural and Mechanical College of the State of Mississippi is located there.

These towns are located in a rich agricultural country, perhaps the richest between Cairo and Mobile. They have cotton manufactories, compresses, banks, various manufacturing enterprises and a jobbing trade, which is carried on both by rail and wagon with nearby points and stations, the traffic by rail depending upon local freight rates.

Meridian is served by the Mobile & Ohio, the New Orleans & Northeastern, the Alabama & Vicksburg, and the Alabama Great Southern. It is a cotton market, has banks, manufactories, cotton compresses, oil mills, cotton factories, is located in an agricultural country, and its merchants carry on a wholesale and jobbing trade by rail and wagon with other towns in that section.

Mobile is located on Mobile Bay about forty-five miles below the confluence of the Tombigbee and Alabama rivers. It has the following railway lines: The Mobile & Ohio, the Mobile and Bay Shore, the Southern, the Louisville and Nashville and the Mobile, Jackson and Kansas City. It has banks, manufactories, cotton compresses, cotton factories and an extensive wholesale and jobbing trade. Truck farming in the vicinity furnishes considerable traffic to northern points. The surrounding country is not agricultural and there is no grain product of commercial importance. There is considerable export traffic from and through Mobile, and it has connection by steamship with American and foreign ports. Steamboats ply on the Mobile, Tombigbee and Alabama Rivers, between Mobile and up-river points. Large pine forests near the city furnish lumber for both domestic and foreign traffic. It is the southern terminus of the Mobile & Ohio. Some twenty or more years ago there was considerable traffic by water through and from New Orleans to Mobile, but the construction of an extension of the Louisville & Nashville from Mobile to New Orleans, and the lowering of rail rates from St. Louis, Cairo and other northern points have driven water craft almost out of business between the two cities.

A table showing the population of these cities and of others

10 I. C. C. REP.

in the same section of country is included in this report for the purpose of comparison.

While complaint in this case is made generally against rates charged on all classes of freight from northern points to the Aberdeen Group of towns, especially rates on bagging for cotton, cotton ties, iron and nails, more specific reference is made to alleged excessive rates charged for the carriage of grain products independently and as compared with rates to Meridian and Mobile on these commodities.

By a joint tariff issued by the Mobile & Ohio on November 25, 1901, taking effect December 9, 1901, to which various railway companies were parties, rates were increased, and it is concerning this increase that complaint is made.

The following tables show the changes in rates on the commodities above mentioned from St. Louis, Missouri, East St. Louis and Cairo, Illinois, to the Aberdeen Group.

Rates in cents per 100 pounds.

From St. Louis, Mo. and East St. Louis, Ill.

		To Tupelo, Miss.			Aberdeen, Miss. West Point, " Columbus, " Starkville, "		
		Jan. 1, 1901 to Mar. 31, 1901, incl.	Apr. 1, 1901 to Dec. 8, 1901, incl.	Dec. 9, 1901 to present date.	Jan. 1, 1901 to Mar. 31, 1901, incl.	Apr. 1, 1901 to Dec. 8, 1901, incl.	Dec. 9, 1901 to present date.
Wheat	}	22	*18	24	22	*18	25
Flour							
Corn	}	18	16	22	18	16	23
Corn Meal							
Oats							

*From April 1, 1901, to June 15, 1901, inclusive, rate on Wheat 16 cents per 100 pounds.

10 I. C. C. REP.

INTERSTATE COMMERCE REPORTS.

Rates in cents per 100 pounds.

From Cairo, Ill.

		To Tupelo, Miss.			Aberdeen, Miss. West Point, " Columbus, " Starkville, "		
		Jan. 1, 1901 to Mar. 31, incl.	Apr. 1, 1901 to Dec. 8, incl.	Dec. 9, 1901 to present date.	Jan. 1, 1901 to Mar. 31, 1901, incl.	Apr. 1, 1901 to Dec. 8, incl.	Dec. 9, 1901 to present date.
Wheat	}	18	*14	19	18	*14	20
Flour							
Corn	}	14	12	17	14	12	18
Corn Meal							
Oats							

*From April 1, 1901 to June 15, 1901, inclusive, rate on Wheat 12 cents per 100 pounds.

Rates in cents per 100 pounds.

From St. Louis, Mo. and East St. Louis, Ill.

		To Meridian, Miss.				Mobile, Ala.		
		Jan. 1, 1901 to Oct. 4, 1901, incl.	Oct. 5, 1901 to Dec. 8, 1901, incl.	Dec. 9, 1902 to May 18, 1903, incl.	May 19, 1903 to date.	Jan. 1, 1901 to Dec. 21, 1902, incl.	Dec. 22, 1902 to Jan. 1, 1903, incl.	Jan. 2 1903 to present date.
Wheat	}	22	18	20	20	17	17	17
Flour								
Corn	}	18	16	18	17½	15	13	15
Corn Meal								
Oats								

Rates in cents per 100 pounds,

From Cairo, Ill.

		To Meridian, Miss.				Mobile, Ala,	
		Jan. 1, 1901 to Oct. 4, 1901, incl.	Oct. 5, 1901 to Dec. 8, incl.	Dec. 9, 1901 to May 18, 1903, incl.	May 19, 1903 to present date.	Jan. 1, 1901 to Dec. 23, 1902, incl.	Dec. 24, 1902 to present date.
Wheat	}	18	14	18	18	18	18
Flour							
Corn	}	14	12	16	15½	11	18
Corn Meal							
Oats							

10 I. C. C. REP.

Rates in cents per 100 pounds.

From St. Louis, Mo. and East St. Louis, Ill.

Distances.	To	Flour		Wheat		Corn		Oats		Corn Meal	
		Rate.	Rate per ton per mile.	Rate.	Rate per ton per mile.	Rate.	Rate per ton per mile.	Rate.	Rate per ton per mile.	Rate.	Rate per ton per mile.
368	Tupelo, Miss..	24	.0184	24	.0184	23	.0119	23	.0119	22	.0119
414	West Point, "	25	.0121	25	.0121	23	.0111	23	.0111	23	.0111
415	Aberdeen, "	25	.0120	25	.0120	23	.0111	23	.0111	23	.0111
439	Starkville, "	25	.0114	25	.0114	23	.0105	23	.0105	23	.0105
442	Columbus, "	25	.0113	25	.0173	23	.0104	23	.0104	23	.0104

NOTE.—The average distance from St. Louis to the points named is 416 miles. On basis of one cent per ton per mile the rate on the commodities shown would be 20.8 cents per 100 pounds.

Rates in cents per 100 pounds.

From Cairo, Ill.

Distances.	To	Flour		Wheat		Corn		Oats		Corn Meal	
		Rate.	Rate per ton per mile.	Rate.	Rate per ton per mile.	Rate.	Rate per ton per mile.	Rate.	Rate per ton per mile.	Rate.	Rate per ton per mile.
214	Tupelo, Miss..	19	.0178	19	.0178	17	.0159	17	.0159	17	.0159
260	West Point, "	20	.0154	20	.0154	18	.0138	18	.0138	18	.0138
261	Aberdeen, "	20	.0153	20	.0153	18	.0138	18	.0138	18	.0138
285	Starkville, "	20	.014	20	.014	18	.0126	18	.0126	18	.0126
288	Columbus, "	20	.0139	20	.0139	18	.0125	18	.0125	18	.0125

NOTE.—The average distance from Cairo to the points named is 262 miles. On basis of one cent per ton per mile the rate on the commodities shown would be 13.1 cents per 100 pounds, or 7.7 cents per 100 pounds less than the rate from St. Louis and East St. Louis, figured on same basis. The present differential of Cairo below St. Louis is 5 cents per 100 pounds.

As will be seen a considerable reduction was made in these rates on April 1, 1901, which, it is claimed, was made on account of the failure of crops in that section and which were to
10 I. C. C. REP.

remain in force only temporarily. On December 9, of the same year these rates were advanced and the advanced rates put in force at that time are still in effect and, as will be noted, are materially higher than the rates which were in force prior to the reduction of April 1, 1901.

The advances made December 9, 1901, stated in percentages were as follows: From St. Louis to Tupelo over the rates of April 1 on wheat and flour, $33\frac{1}{3}$ per cent; on corn and corn meal $37\frac{1}{2}$ per cent. To West Point, Aberdeen, Starkville and Columbus on wheat and flour 39 per cent; on corn and corn meal 43.8 per cent. From and to same points the advances of December 9 over the rates in force prior to April 1, 1901, were as follows: To Tupelo, on wheat and flour, 9.1 per cent; on corn and corn meal 22.7 per cent. To West Point, Aberdeen, Starkville and Columbus, on wheat and flour 13.7 per cent, and on corn and corn meal 27.8 per cent.

Rates from St. Louis to Meridian are made via the Mobile & Ohio, Missouri, Kansas & Texas and the Illinois Central; also the Mississippi River to Vicksburg, and thence by the Alabama & Vicksburg to Meridian. Rates from St. Louis to Mobile are made by the Mobile & Ohio, the Louisville & Nashville, and also by water lines via the Mississippi, New Orleans and the Gulf of Mexico.

The regular rate on grain by barge via Mississippi River from St. Louis to Vicksburg, is 10 cents per 100 pounds, but rates are made as low as $7\frac{1}{2}$ cents and the rate from Vicksburg to Meridian by rail is 10 cents via the A. & V. Ry. All-rail shipments destined to Meridian via Vicksburg, are given a proportional rate from Vicksburg of 3 cents, while a re-billing rate of $3\frac{1}{2}$ cents is allowed by the A. & V. to Meridian on shipments forwarded within sixty days after arrival at Vicksburg.

There is no regular line of steamboats for the transportation of freight from St. Louis or Cairo to Vicksburg or New Orleans, though there are occasional "tramp" boats. Transportation by barge is quite limited, as the stage of water in the Mississippi River will not permit of full barge loads for more than

four or five months in the year. Less than one twenty-fifth of the grain and grain products received at Vicksburg comes down by the river.

Rate schedules established for the Aberdeen Group, as well as to all junction points in the surrounding country, are made through agreement or understanding arrived at by representatives of various roads, forming an association of common carriers who meet and consider the subject; and the rates thus made are generally closely adhered to.

These rates to the Aberdeen Group are made and adopted by the Southeastern Mississippi Valley Association, which is composed of the following companies: Alabama Great Southern, Alabama & Vicksburg, Cincinnati, New Orleans & Texas Pacific; Illinois Central, Illinois Central R. R. Co., (Louisville Division); Kansas City, Memphis & Birmingham; Louisville & Nashville, Memphis & Charleston, Mobile & Ohio; Nashville, Chattanooga & St. Louis; New Orleans & Northeastern, Southern, and Yazoo & Mississippi Valley.

This schedule includes all kinds of freight except local freight and coke, bituminous coal, cotton and export and import traffic.

Rates to Corinth, Tupelo, Columbus, Aberdeen, West Point and Starkville are governed by this agreement.

The agreement also has the following clause: "It is understood that on traffic to and from the territory south and east of the line Jellico, Birmingham, Selma, and Montgomery to Pensacola, including junction points on the Alabama Mineral Division of the L. & N. R. R. (Attalla to Calera inclusive), this Association shall co-operate with the Southeastern Freight Association."

At the time of the adoption by the association of the articles of agreement, the Mobile & Ohio expressly excepted and eliminated Meridian and Mobile from the agreement. Mr. Poe, general traffic manager of the Mobile & Ohio, said in his testimony before the Commission: "We do not want to put Meridian in unless Jackson, Mississippi, is in, and the Alabama & Vicksburg Ry. Co., declined to put Jackson in." Another

reason assigned by Mr. Poe why Meridian was not included was because it was reached by the Southern Railway, which was a member of another association (the Southeastern Freight Association), of which the Mobile & Ohio was not a member. Mr. Miller, general freight agent of the Mobile & Ohio, stated in his testimony that the A. & V. Ry. would not consent to Jackson being included; but Meridian and Jackson are only a few miles apart, and they compete very closely; and the M. & O. "did not want to restrain it at the one and not at the other."

Mobile is not covered by any association.

The Alabama & Vicksburg is located entirely within the State of Mississippi, and traffic originating at Vicksburg, its western terminus, and carried to Meridian is not interstate traffic; but it is the terminal portion of a line from St. Louis, of which the Illinois Central and the Yazoo & Mississippi Valley roads form the rest of the line. It is also the terminal part of the line from Kansas City, formed by the Missouri, Kansas & Texas, the Vicksburg, Shreveport and Pacific, and the Alabama & Vicksburg roads.

West Point and Columbus are stations on the branch of the Southern Railway extending from Greenville on the Mississippi River to Birmingham, and are located 150 and 168 miles respectively from Greenville. Similar facilities for river traffic are found at Greenville to those that Vicksburg enjoys, but this fact does not seem to have any effect to lower rates to West Point or Columbus.

The Mobile & Ohio, was the first rail line constructed to Meridian and Mobile and is the short distance line from Cairo, St. Louis and also Kansas City (through its western connections) to both Meridian and Mobile.

The rail rates on grain from Kansas City, St. Louis and Cairo to New Orleans are the same as the rail rates to Mobile.

Boats between New Orleans and Mobile carry lumber, rosin and some other articles; they do not carry grain, but no doubt would do so if the rate margin would justify it. Grain is carried by barge from St. Louis to New Orleans as low as 7½ cents

per 100 pounds, and the rate by rail via the L. & N., New Orleans to Mobile, is 10 cents per 100 pounds, but grain is seldom carried by rail between the two points.

There is a joint tariff to which the defendant and other roads are parties in effect from St. Louis, East St. Louis, Kansas City and Omaha to Mississippi Valley points, Hickman, Memphis, Baton Rouge, Mobile and other points; but this is not issued by the S. E. M. V. Association.

Formerly, rates from St. Louis and Cairo to Mobile were higher than to New Orleans and lower Mississippi landings, but the M. & O., wishing Mobile to control trade to certain territory, contended that rates from northern centers and river crossings should be the same as to New Orleans. This reduction was opposed by the L. & N., and other lines, but the lower basis was finally placed in effect by the M. & O., and has since been maintained. It was a question of market rather than water competition. No steamship line ever competed with the railways for the carriage of grain and grain products, and like heavy goods or hardware, into Mobile.

Cotton consigned over the M. & O. from the Aberdeen Group, to eastern or northeastern markets or mills, is carried under joint tariffs made by the initial road and its eastern connections.

It was shown that at the junction points above named an effort had been made, under some sort of an agreement or arrangement, to pool or divide evenly this cotton freight, which, though not capable of exact division was practically apportioned among the roads, and the percentage of shipments made by each road was reported to the traffic management of the roads interested. If a road received more than its agreed quota of such freight, it was equalized by turning over freight subsequently offered whenever opportunity occurred, but a road never refused to carry such freight when requested to do so by the shipper. This practice was encouraged by the action of the railroad association through whose machinery the rates were established as heretofore stated. Several carriers in this territory, including one of the parties to the above transaction, were

10 I. C. C. REP.

indicted about the time of the hearing of this case for alleged division of cotton freights.

Cotton, shipped from Vienna by boat to Columbus and thence by rail to the Carolina mills, is charged 69 cents per 100 pounds, compression included, whereas, if carried down the river to Demopolis and put on the rails there, the through charge is only 43 cents, compression included, while the through distance by both routes is about the same.

Some arrangement or agreement was made by the M. & O. and other roads centering at Montgomery by which the boats agreed not to carry cotton down the river to Mobile, which has decreased the amount of cotton carried by boat. However, an independent boat line has been running, which is not a party to the agreement. This agreement has been in force about three years. It has prevented the movement of cotton to Mobile and directed it east from Montgomery, but there was no increase in rates on cotton to Montgomery or Mobile.

The Tombigbee River is navigable for from four or five months to ten or twelve months of the year for boats of 225 tons capacity. Three or four boats carry freight between points on the river.

At existing rates freight may be shipped by rail from St. Louis via the M. & O., to Mobile and thence back up the river by boat to a point forty miles from Columbus, for a less rate than it can be shipped to Columbus and thence by the river to destination.

The following table shows the population of the Aberdeen Group separately and combined, also of other towns in the same section of country and of similar distances from St. Louis, and of Meridian and Mobile as given by the U. S. Census of 1890 and 1900.

	1890	1900	Gain or Loss	Per Cent.
Columbus	4,550	6,484	1,925	42
Tupelo	1,477	2,118	641	42
West Point	2,762	3,193	431	15
Starkville	1,725	1,986	261	15
Aberdeen	3,449	3,434	15	.045
Aggregate	13,972	17,315	3,343	25

10 I. C. C. REP.

	1890	1900	Gain or Loss	Per Cent
Greenville	6,558	7,042	484	7
Jackson, Miss.	5,920	7,816	1,896	32
Holly Spring	2,246	2,815	569	20
Cullman	1,017	1,255	238	23
Decatur	2,765	3,114	349	12
Aggregate	18,506	22,042	3,536	
Meridian	10,624	14,050	3,426	32
Mobile	31,076	38,469	7,393	23

Statement showing proportion of grain as compared with other freight received at Mobile and the Aberdeen Group, during the months of January, February and March, 1902.

MOBILE, ALA.

	January	February	March
Grain	25,333,000	14,176,000	14,200,000
Other Freight	48,529,000	40,237,000	47,489,000
Total	73,962,000	54,413,000	61,689,000

.. COLUMBUS, MISS.

	January	February	March
Grain	602,000	662,000	1,207,000
Other Freight	9,124,000	5,751,700	7,853,000
Total	9,726,000	6,413,700	9,060,000

STARKVILLE, MISS.

	January	February	March
Grain	195,000	73,500	252,000
Other Freight	1,412,300	1,495,000	1,049,000
Total	1,607,300	1,568,500	1,301,000

WEST POINT, MISS.

	January	February	March
Grain	308,000	276,000	443,000
Other Freight	5,810,600	5,222,000	6,459,000
Total	6,118,600	5,498,000	6,902,000

ABERDEEN, MISS.

	January	February	March
Grain	127,000	188,000	366,000
Other Freight	1,214,000	1,481,000	974,000
Total	1,341,000	1,669,000	1,340,000

TUPELO, MISS.

	January	February	March
Grain	237,000	106,000	222,000
Other Freight	5,999,000	3,219,000	4,249,000
Total	6,236,000	3,225,000	4,471,000

STATEMENT OF FREIGHT TRAFFIC, SHOWING TONS AND REVENUE ON ALL CLASSES RECEIVED AT MOBILE, MERIDIAN AND THE ABERDEEN GROUP, FOR THE YEARS OF 1900 AND 1901, AND THE FIRST FOUR MONTHS OF 1902.

Four months						
1902			1901		1900	
	Tons	Revenue	Tons	Revenue	Tons	Revenue
Mobile	131,330	\$206,821.69	387,556	\$682,619.43	385,939	\$752,638.15
Meridian . . .	64,707	125,194.73	193,549	370,550.35	175,835	355,613.76
Starkville . .	2,763	5,764.57	15,152	25,119.64	9,307	22,813.32
Columbus . .	10,840	25,959.60	36,614	83,479.68	35,677	89,057.52
West Point . .	7,775	13,329.83	34,732	65,152.85	26,028	58,724.56
Aberdeen . . .	3,175	8,013.93	8,207	21,831.69	10,122	30,899.57
Tupelo	8,831	26,110.83	37,605	99,214.60	26,415	72,874.98

STATEMENT OF FREIGHT TRAFFIC, SHOWING TONS AND REVENUE ON ALL CLASSES FORWARDED FROM MOBILE, MERIDIAN AND THE ABERDEEN GROUP FOR THE YEARS OF 1900 AND 1901, AND THE FIRST FOUR MONTHS OF 1902.

	Four months					
	1902		1901		1900	
	Tons	Revenue	Tons	Revenue	Tons	Revenue
Mobile	69,768	\$160,749.14	179,675	\$536,076.11	153,853	\$452,798.76
Meridian . . .	160,920	292,066.66	371,264	685,470.16	401,528	655,194.73
Starkville . .	937	2,845.63	3,339	9,119.23	2,374	9,385.04
Columbus . . .	42,548	65,437.79	56,490	87,939.16	41,063	69,074.40
West Point . .	18,382	23,235.78	37,676	47,743.19	27,847	35,851.38
Aberdeen . . .	10,939	7,439.55	29,016	30,072.55	23,694	26,396.61
Tupelo	10,834	22,566.25	30,211	56,439.34	30,941	58,590.50

The Report on Statistics of Railroads compiled by the Commission for the year ending June 30, 1902, shows the following figures for the revenue per ton per mile received.

Average of all the roads in the United States . . . . .	.757
Average of the roads in Group V . . . . .	.816
The M. & O. total mileage . . . . .	.597
The M. & O. lines south of Cairo, which include all of the roads in Group V . . . . .	.633

From annual reports of the Mobile & Ohio for the years named.

Year ending June 30.	Gross earnings from operation and other income.	Less operating expenses and deductions from income.	Surplus from operations of year.
1896	\$3,620,065.37	\$3,529,473.60	\$90,591.77
1897	3,872,758.00	3,853,439.25	19,318.75
1898	4,208,460.12	4,158,841.65	49,618.47
1899	4,542,002.28	4,506,646.70	35,355.58
1900	5,990,242.77	5,938,859.91	51,382.86
1901	6,260,532.40	6,277,577.02	17,044.62
1902	6,643,522.80	6,519,472.58	124,050.22

y Deficit.

The report of the Southern Ry., year ending June 30, 1902, shows,—

Ownership of	\$4,932,600 (or 64 per cent)
Out of	7,680,000 outstanding of
Mobile & Ohio	<i>Capital Stock,</i>
	and
Shows ownership of	\$7,949,500 (or 37 per cent)
Out of	21,469,545 outstanding of
	Mobile & Ohio <i>Mortgage Bonds.</i>

Beside the latter amount there is outstanding of funded debt of the M. & O.

Miscellaneous obligations	.....	\$2,500,000.00
Income bonds	.....	1,763,000.00
Equipment trust obligations	....	2,478,765.56

The stocks and bonds of the M. & O. owned by the Southern Ry. appear in the report of the latter company in sections covered by the following explanation: "Pledged under Southern Railway Co. Consolidated Mortgage, pledged under other Mortgages or agreements, or held in Treasury for control of subsidiary properties in Southern Railway System, or held as muniments of title."

The following statement is taken from page 15 of the annual report of the Mobile & Ohio for the year ending June 30, 1902: "The Southern Railway Company does not appear upon the books of the Mobile & Ohio Railroad Company as a stockholder of record, and therefore the Mobile & Ohio Railroad Company, as such, has no knowledge of the subject. . . .

"The holding of record of a large majority of the Mobile & Ohio Railroad Company's stock is lodged with the Farmer's Loan and Trust Company, of New York, under a debenture deed of trust dated first of May, 1879, and this stock stands upon the books of the Company in the name of the Farmer's Loan and Trust Company.

10 I. C. C. REP.

"It is a matter of public knowledge, however, that a large majority of the holders of the stock certificates of the Mobile & Ohio Railroad Company did sell their certificates prior to June 30, 1901, to the Southern Railway Company, and it is understood that the Southern Railway Company has issued against such certificates its Mobile & Ohio Stock Trust certificates secured by a pledge of the Mobile & Ohio Railroad Stock Certificates to the Guaranty Trust Co., of New York, and that the position of the Mobile & Ohio Stock Certificates was reported to the Interstate Commerce Commission in the Southern Railway Company's report to the Commission for the year ended June 30th, 1901, on page 37. The transaction is also set forth on pages 6 and 14 of annual report of the Southern Railway to its stockholders for the year ended June 30, 1901."

CONCLUSIONS.

There are two questions presented for determination in this case: First, the alleged unlawful discriminations in favor of Mobile and Meridian and against Tupelo, Aberdeen, Columbus, West Point and Starkville, herein designated as the "Aberdeen Group," by the higher scale of rates to the five cities last named than to Mobile and Meridian on traffic from St. Louis, East St. Louis and Cairo.

Both at Meridian and Mobile defendant is confronted by competition of transportation that is actual, substantial and controlling. The circumstances and conditions existing at towns in the Aberdeen Group and Meridian and Mobile are substantially dissimilar.

We must be guided by the established interpretation of the law by the courts in which the validity of all contested orders of the Commission must be determined. In view of this judicial interpretation of the provisions of the third and fourth sections of the Act to regulate commerce relating to discrimination

10 I. C. C. REP.—20.

tions, it is not believed that upon the facts appearing the Commission could make an order that would be effective condemning the discriminations found in this case as unreasonable.

The other question is that of the alleged unreasonableness of the rates on all commodities from St. Louis, East St. Louis and Cairo to the Aberdeen Group, and of the rates from these five cities on interstate traffic to all points covered by the distance tariff schedule of the defendant company designated as "I. S. 3058." It will be observed that this allegation of the complaint is sweeping and general, applying to all traffic between the points indicated in Mississippi and numerous other points in several States, as well as from St. Louis, East St. Louis and Cairo to the said five points in Mississippi. While we do not feel warranted in making a finding to the effect that all these rates are reasonable and just, we do not, on the other hand, feel justified, upon the testimony at hand, in finding that they are, as a whole, unreasonable. The rates shown in the distance tariff above mentioned are, on some articles, less than the rates fixed by the Mississippi commission, while on others they are materially higher, and upon many others they are the same. But the testimony, except as hereinafter stated, does not disclose the information, in respect to the circumstances and conditions affecting the different classes and numerous articles of freight and the business as conducted between the different points involved in various directions, necessary to enable us to satisfactorily determine the question as applied to the different rates, in the event that some may be reasonable and just and others not, which may be the fact. This, however, is not true in respect to certain rates on grain and grain products in carload shipments from St. Louis, East St. Louis and Cairo to the Aberdeen Group. As shown before these rates on grain and grain products are such that they approximate $1\frac{1}{4}$ cents per ton per mile from St. Louis, about 400 miles haul. This is about twice as much per ton per mile as the average of all rates on the freights carried by the defendant road, and nearly twice as much as the average upon

all roads in the United States. Grain in carloads is usually loaded and unloaded by the shippers or consignees. Cars are susceptible of heavy loading with these articles. They often move in train loads and are generally carried throughout the country at relatively low rates as compared with other articles. Especially is this true in respect to long hauls.

It appears to us that rates resulting from a reduction of three cents per hundred pounds and approximating one cent per ton per mile on these articles for the distances from St. Louis, and East St. Louis, to the designated points of destination in Mississippi, would be liberal and sufficiently high.

The distances from Cairo, Ill., to these Mississippi points respectively being materially less, the rates in force upon each of the articles under consideration are five cents less per hundred pounds than from St. Louis, and we see no reason to criticise this differential.

The following table indicates what rates on the several articles in question would result from the reduction above stated.

		Rates in cents per 100 pounds.									
		St. Louis, Mo. and East St. Louis, Ill.									
		Flour		Wheat		Corn		Oats		Corn Meal	
Distances from St. Louis	From	Rate.	Rate per ton per mile.	Rate.	Rate per ton per mile.	Rate.	Rate per ton per mile.	Rate.	Rate per ton per mile.	Rate.	Rate per ton per mile.
	To										
363	Tupelo, Miss.,	21	.0114	21	.0114	19	.0108	19	.0108	19	.0103
414	West Point, "	22	.0106	22	.0106	20	.0097	20	.0097	20	.0097
415	Aberdeen, "	22	.0106	22	.0106	20	.0096	20	.0096	20	.0096
439	Starkville, "	22	.01	22	.01	20	.0091	20	.0091	20	.0091
442	Columbus, "	22	.0097	22	.0097	20	.00905	20	.00905	20	.00905

Average rate per ton per mile .0091.

Rates from Cairo on these articles to the destinations indicated, five cents less per hundred pounds, would produce a rate per ton per mile somewhat higher upon the average than one cent, but this is believed to be justified on account of the substantially shorter distances involved.

We conclude upon the facts that the present rates charged on wheat, flour, corn, corn meal, and oats, from St. Louis, Mo., and East St. Louis and Cairo, Ill., to the said points in Mississippi, namely, Tupelo, Aberdeen, West Point, Columbus and Starkville, are unreasonable, unjust and unlawful, and that the defendant should cease and desist from charging and enforcing the same.

An appropriate order will be made pursuant to the findings and conclusion herein.

10 I. C. C. REP.

No. 687.

IN THE MATTER OF ALLOWANCES TO ELEVATORS
BY THE UNION PACIFIC RAILROAD COMPANY.

Decided June 25, 1904.

The U. P. R. Co. entered into contracts with P. & Co. under which the latter erected grain elevators at Council Bluffs and Kansas City for the transfer of grain at those terminals of the U. P. System, and for the service of transferring grain by elevator at said points the U. P. agreed to pay P. & Co. $1\frac{1}{4}$ cents per 100 lbs. Corporations controlled by P. & Co. were formed to conduct the elevators at each point. P. & Co. are large buyers and shippers of grain in the northern and western grain producing states and control a large number of country elevators. In making this arrangement the U. P. acted in good faith, and the facts indicate that $1\frac{1}{4}$ cents per 100 lbs. is not an excessive charge for the service as conducted by the elevator companies. The real complainants in the proceeding are carriers competing with the U. P. who claim that if this arrangement is not declared illegal they will be compelled to make similar allowances at transfer points on their lines, and no shipper nor any dealer in competition with P. & Co. has appeared to complain or protest in any manner against this arrangement. *Held:—*

1. That the compensation paid for the elevator or transfer service is not unreasonable.

2. That the U. P. is entitled to perform the work itself or hire it done by others and is not legally at fault or guilty of wrong doing because incidentally those employed by the carrier to transfer the grain are aided more or less in another line of business in which they are engaged.

3. That any injury or detriment resulting to rival carriers under the arrangement is something which the law does not seek to prevent.

J. N. Baldwin and *J. C. Stubbs* for Union Pacific R. R. Co.

M. B. Koon and *Frank Hagerman* for Omaha Elevator Company and Midland Elevator Company.

Gardiner Lathrop for Atchison, Topeka & Santa Fe Ry. Co.
10 I. C. C. REP.

REPORT AND OPINION OF THE COMMISSION.

KNAPP, *Chairman*:

Acting upon information in the nature of informal complaint the commission instituted this inquiry on its own motion to ascertain the facts respecting allowances by the defendant company to the owners of certain elevators and to determine whether, as is claimed, those allowances are in violation of law.

The Union Pacific Railroad Company operates an extensive system of railways in the states of Nebraska, Kansas, Colorado, Wyoming and Utah. The principal line of this system extends from Council Bluffs, Iowa, to Ogden, Utah, and there is another main line from Kansas City, Missouri, to Denver, Colorado. These two lines are connected by a line from Denver to Cheyenne, Wyoming, and from a point on the latter there is a connecting line to Julesburg on the line first described. There are also various auxiliary and branch lines in the states above mentioned, the total mileage operated being nearly three thousand miles. The eastern termini of the system are at Council Bluffs and Kansas City, both located on the Missouri River. No line leading easterly or southerly from those points is owned or controlled by the Union Pacific company.

The lines competing with the Union Pacific in Nebraska are the Burlington, the Rock Island, and the Nebraska Division of the Chicago & Northwestern, formerly the Fremont, Elkhorn & Missouri Valley. There is limited competition in that State with the Omaha road, a part of the Northwestern system, and with the St. Joseph & Grand Island. In Kansas the principal competitors of the Union Pacific are the Atchison, the Missouri Pacific, and the Rock Island. To some extent the Burlington and the Missouri, Kansas & Texas are competitors in the last-named state.

Of the carriers above named, the Burlington, the Rock Island and the Northwestern have lines extending easterly from Council Bluffs and Omaha to Chicago. The Burlington and the Northwestern also have lines connecting Nebraska points with Chicago which do not pass through Omaha and Council Bluffs. The Burlington, the Rock Island and the Atchison have lines

extending easterly from Kansas City to Chicago. The Missouri Pacific has its northern terminus at Omaha, and all its lines are west of the Missouri River. The Missouri, Kansas & Texas system is mainly south and west of Kansas City and St. Louis, though it has a line to Hannibal on the Missouri River. The St. Joseph & Grand Island is wholly in Kansas and Nebraska.

There are several important roads which extend easterly from various points on the Missouri River, but have no lines west of that river. Among these are the Chicago, Milwaukee & St. Paul and the Wabash, reaching both Omaha and Kansas City; the Chicago Great Western, reaching Omaha, St. Joseph and Kansas City; the Illinois Central, reaching Omaha; the Chicago & Alton, reaching Kansas City and St. Louis; and the Toledo, St. Louis & Western, reaching St. Louis. So far as concerns the questions in this case the Union Pacific is the only extensive system operating wholly in the territory west of the Missouri River.

In the states of Nebraska and Kansas there is a large production of grain which moves over the lines of the Union Pacific to the Missouri River on its way to eastern and foreign markets. If this grain is carried to destination in the Union Pacific cars in which it is originally loaded, the transportation must be completed by connecting lines over which the Union Pacific has no control. As the principal markets of consumption are in the eastern states and foreign countries, the grain must be carried long distances to reach domestic destinations or the ports of trans-shipment abroad. In such case the cars are absent from the originating road for considerable periods of time and the interval before their return is a matter of uncertainty. When this method of transporting the grain is employed the Union Pacific must relinquish possession of its cars at the Missouri river and can get them back again only after prolonged and indefinite absence. In the meantime the company is deprived of the use of such cars and cannot know when they will again be available for its own shippers.

For the most part grain is transported in bulk in ordinary box cars, the same as those used for miscellaneous freight. The movement is not constant and regular throughout the year but is

10 I. C. C. REP.

largely confined to comparatively short seasons, depending more or less on the size of the crop and the range of obtainable prices. During the grain shipping seasons there is a pressing demand for cars, particularly when market conditions tend to stimulate sales. It is a matter of common knowledge that the last few years have been exceptionally prosperous in all branches of business. Not only has the grain production in the states named been greatly increased, but traffic of all kinds has been offered for carriage in unprecedented volume. Although the Union Pacific—in common with other roads—has made large additions to its car and locomotive equipment, it has frequently been unable to meet the requirements of shippers. The growth of its traffic has exceeded the increase of its transportation facilities. Under these circumstances it could ill afford, in justice to its own patrons, to allow its cars to pass from its control and to be absent for varying and uncertain periods, in order to carry to destination the grain originating on its lines.

Moreover, the loading of cars at the country stations, either because the older cars of the Union Pacific are of low capacity or because of conditions at the points of origin, is in most cases comparatively light. The economical movement of this grain for the long distances it is carried east of the Missouri River requires a heavier loading of cars than can ordinarily be secured at the local stations of the initial road. It seems reasonable to believe that in actual practice the original loading of grain cars on the lines of the Union Pacific would generally fall below the loading needful to the cheapest hauling of the grain to remote destinations.

For these and perhaps other reasons it became highly important, if not absolutely essential, for the Union Pacific to provide for the transfer of this grain to other cars than its own at its termini on the Missouri River. Such a transfer was practically necessary to secure the prompt release of its equipment, to enable it to retain the control and use of its cars and thereby to better satisfy the demands of shippers upon its lines. This requirement of the situation could be met by the Union Pacific either by arranging for the transfer by its own appliances and employees or by contracting with others to perform the required

service. The latter course was adopted and thereupon an agreement was entered into which will now be described.

This agreement was executed under date of February 7, 1899, and the contracting parties are the Union Pacific Railroad Company and Frank H. Peavey, of Minneapolis. The provisions of the contract are somewhat elaborate but those material to the present controversy can be briefly stated. The railroad company agreed to convey to Peavey a certain tract of land in Council Bluffs, containing about 90,000 square feet, and any additional land adjoining the same that might be required to enlarge the elevator building which Peavey was to construct; to provide yard room and maintain a system of side-tracks and switches in connection with such elevator, according to plans shown on a map attached to and made a part of the contract; to deliver to said elevator all grain originating on its lines and transported thereover which might be consigned to or in cars of said elevator, and to pay Peavey on all such grain transferred through said elevator a transfer charge not exceeding one and one quarter cents per hundred pounds during the first ten years of the contract, and not exceeding one cent per hundred pounds thereafter, but at no time more than the transfer charge customarily made on similar business at similar points; to provide for said elevator equal privileges and advantages to those granted any other elevator then or thereafter served by it at Omaha or Council Bluffs, and to switch free of charge all cars, loaded or empty, to and from said elevator, between points on its road within ten miles of Omaha; to receive from and deliver to connecting roads at Council Bluffs cars for loading, unloading or transfer of grain at said elevator as cheaply as it handles cars for loading, unloading or transfer to any other elevator at Omaha or Council Bluffs, and not exceeding such aggregate sum in any one year as will equal five per cent on its investment, as described in the contract, the total cost to be apportioned between the several lines on a wheelage basis; and to permit other connecting roads at Council Bluffs to use said side tracks and switches for access to said elevator upon terms stated at length in the contract, which are not claimed in this proceeding to be unfair or unreasonable.

10 I. C. C. REP.

Peavey on his part agreed to erect on said premises and have ready for operation by June 1, 1899, a first class elevator, equipped with modern appliances, of the capacity of about 1,500,000 bushels, and thereafter to maintain the same in like condition; to receive from the railroad company any grain originating on its lines consigned to or in care of said elevator to the capacity thereof, and to promptly transfer such grain from the company's cars through said elevator, the grain tendered by the company to be first transferred and its cars promptly released; and to receive and safely store in said elevator for forty-eight hours free of charge any grain originating on the company's lines and delivered from its tracks at said elevator for storage or transfer.

In pursuance of this contract the elevator was built at a cost of about \$200,000. It was completed in the summer of 1899 and has been in operation since that time. While the elevator was in process of construction or soon afterwards, as we infer, Peavey assigned his interest in the contract, with the consent of the Union Pacific, to the Omaha Elevator Company, a corporation which appears to have been organized for the purpose of acquiring the elevator plant and business, and which has since owned and conducted the same. This involved no substantial change of proprietorship, as a controlling interest in the stock of the corporation has always been owned by members of the firm of F. H. Peavey and Co., of which Frank H. Peavey was the senior partner. He died in December, 1901, but the business has been continued by the surviving partners, and those interested in his estate, as we understand, under the same firm name. In other words, this firm is the virtual owner of the elevator in question and the beneficiary of the contract with the Union Pacific.

A similar situation exists at Kansas City and a similar arrangement was made by the Union Pacific for the transfer of grain at that point. The elevator there is located in Kansas City, Kansas, which is commercially the same as Kansas City, Missouri. This elevator, which has a capacity of about 1,000,000 bushels, is operated by the Midland Elevator Company, a corporation whose capital stock is substantially all owned by

the individual members of the firm of F. H. Peavey & Co. There appears to be no written agreement between the Union Pacific and the Midland Elevator Company, but the terms upon which grain is transferred and stored by the latter company, and the other incidents of its relations with the Union Pacific, are practically if not identically the same as those provided in the contract with the Omaha Elevator Company above described. For this reason it seems unnecessary to make more specific findings in regard to the Midland Elevator Company or to separately discuss the questions presented by the contract with that company.

These agreements appear to have been carried out in conformity with their terms and to the mutual satisfaction of the parties thereto. It is not claimed that any greater allowances are made to the elevator companies, or that any other benefits are derived by the owners thereof, than those accorded by the contracts in question; the contention is that the observance and execution of these contracts, by reason of facts about to be stated, secure to Peavey & Co. undue preference and advantage and subject other shippers to undue prejudice and disadvantage.

F. H. Peavey & Co., according to the testimony of a member of that firm, are grain merchants and owners of elevator properties. They appear to have some 450 country elevators, as they are called, in the states of North Dakota, South Dakota, Minnesota, Iowa, Nebraska and Kansas, besides larger elevators at Council Bluffs, Kansas City, Duluth, Minneapolis and Chicago, and their business is extensive in the states named and elsewhere. As above found, they control and virtually own the two elevators at Council Bluffs and Kansas City. They are also large buyers of grain upon the Union Pacific system. So much of the grain thus bought as is consigned to Omaha or Council Bluffs, that is to the Omaha Elevator Company, is purchased in the name of that company; that which is consigned to Kansas City appears to be bought in the name of the Midland Elevator Company; but this does not matter in one case or the other. The practical identity of the three concerns renders the form of the transactions quite unimportant. It is

10 I. C. C. REP.

sufficiently accurate, therefore, and serves the purpose of convenience, to speak of Peavey & Co. as grain buyers and shippers on the lines of the Union Pacific.

While no definite figures were given, it is fairly inferable from the testimony, and was understood to be admitted in a general way, that Peavey & Co. handle some sixty per cent, perhaps more, of the grain shipped from Union Pacific stations. Substantially all the grain so shipped by them is transferred through these Peavey elevators, and on all that grain they are paid the 1 1/4 cents per hundred pounds for making the transfer. At Kansas City, however, a small amount of this grain is summed locally, and any transfer charge collected on such grain is refunded. It also appears that little or no grain is transferred through these elevators for other parties, although the Union Pacific has the right to require such transfer under the terms of its contract. The reason assigned for not exercising this right is that the Union Pacific can and does, as a practical matter, provide for the through transportation of grain shipped by other dealers without transfer at its terminals. In the interchange of carload traffic the Union Pacific takes to points on its lines a large number of cars belonging to its connections, and many of these cars are available for return loads of grain. In some cases also, as it seems, Union Pacific cars loaded at interior stations with grain of such dealers are allowed to go to destination, or at least to points east of the Union Pacific lines. To some extent there appears to be shovel transfer for shippers other than Peavey & Co. In these ways, it is said, the grain shipments not controlled by that firm are fully accommodated without the necessity of a transfer through the elevators in question.

Some indication of the amount of grain transferred by the Peavey elevators appears from a statement produced at the hearing. This statement shows that 12,329,381 bushels were transferred at Kansas City between July, 1898, and May, 1903; and that 23,839,533 bushels were transferred at Council Bluffs between July, 1899, and May, 1903. The amount varies greatly in different years. For example, the lowest year at Council Bluffs was 2,953,776 bushels, the highest, 8,695,594; at Kan-

sas City the lowest was 1,120,441 bushels, the highest, 4,673,850.

Now, in view of these and other related facts, it is charged that the Union Pacific arrangement with these elevator companies owned by Peavey & Co. is preferential and unlawful. This charge is based at last upon the claim that the contract price for transferring grain is exorbitant and unreasonable, that it is much greater than the necessary cost of performing the service and that, therefore, it has the indirect but actual effect of a prohibited concession or rebate to Peavey & Co., because they are the shippers of the grain thus transferred at a profit through their own elevators. In the language of one of the briefs: *"The contention is that the payment of a cent and a quarter per hundred pounds is excessive, and the resultant effect of operations under said contract, and upon the basis therein provided, is that the Union Pacific Railroad Company discriminates in favor of the two elevator companies as grain shippers; that the allowance of a cent and a quarter per hundred pounds, paid to the said elevator companies for transferring their own grain, amounts in its ultimate result to a rebate because it so much reduces the through published rate, in favor of said elevator companies, but not in favor of other shippers."*

This is the controverted question of fact which will now be considered. To this question much of the testimony was directed and widely divergent claims are made by different parties. Among the proofs submitted is a statement from the books of Peavey & Co. produced by a member of that firm, showing the receipts and expenses of the two elevators for a period of years. From this statement, the accuracy of which was not seriously questioned, it appears that the total earnings of the Council Bluffs elevator for the transfer of grain from July, 1899, to June, 1903, were \$157,639.96; the expenses of operation, including taxes, insurance on building, maintenance and repairs, \$110,468.30; and the aggregate profit, \$47,171.66, or an average annual profit of \$11,792.91. At Kansas City the earnings for transferring grain from July, 1898, to May, 1903, were \$92,069.63, the operating expenses, including the same items, \$77,500.00, the aggregate profit, \$14,569.63, the average

10 I. C. C. REP.

annual profit, \$2,913.92. This allows nothing in either case for interest on investment, depreciation of plant, insurance on grain in storage or expenses of general management. The elevator at Council Bluffs cost \$200,000, the one at Kansas City, \$150,000. If these figures are substantially correct, as we assume they are, it is evident that the transfer business, considered by itself, was unprofitable and that Peavey & Co. could not afford to construct and operate these elevators for the sole purpose of transferring grain at $1\frac{1}{4}$ cents per hundred pounds.

The chief traffic officer of the Chicago Great Western testified that elevators were operated by that road at Kansas City and St. Joseph through which a large amount of grain is transferred at a cost, not including taxes or expenses of general management, of $1\frac{1}{6}$ cents per hundred pounds, and that he would be very willing, for reasons stated by him, to pay an independent company $1\frac{1}{4}$ cents for performing the service. It also appears that another carrier pays one cent per hundred pounds for transferring grain at Burlington, Iowa, and has done so for a number of years. This payment is made to a firm which buys extensively on the lines of that carrier and whose business is similar to that conducted by Peavey & Co. It should be stated, however, that the allowance to this concern is claimed to be made, partly at least, because of the transfer charges paid to their competitors, Peavey & Co., at Council Bluffs and Kansas City.

Other facts disclosed tend more or less to show that the allowance to Peavey & Co. is not unreasonable. For instance; at Council Bluffs there is another elevator, with a capacity of 750,000 bushels, belonging to the Union Elevator Company. The stockholders of that company are six railroads, viz.: the Union Pacific, the Northwestern, the Burlington, the Rock Island, the Milwaukee and the Wabash, each owning a one-sixth interest. This elevator is leased to and operated by the Trans-Mississippi Grain Company, and that company transfers grain through its elevator on the same terms and conditions that grain is transferred through the Peavey elevators. The Trans-Mississippi Grain Company is also, as we understand, a large buyer and shipper of grain. To the extent of its business, therefore, it seems to be in much the same situation as

Peavey & Co. and in like relation to other buyers on lines where its purchases are made. The fact that a rival concern, operating over various roads in that section of country, receives the same compensation for transferring grain as Peavey & Co. is some indication that the amount paid is not excessive.

A like inference apparently follows from comparison with elevator charges fixed by state regulation or customarily paid at other points where large quantities of grain are handled. Without detailing the figures it is sufficient to say that the prices elsewhere applied, taking into account differences of conditions, do not establish the claim that Peavey & Co. are unduly remunerated.

Moreover, it was not seriously contended that Peavey & Co. in fact pay any more for grain than other buyers. One witness, it is true, expressed a rather vague opinion to the contrary, but aside from his statement the testimony was unqualified that the arrangement in question had not affected the prices paid to the producer. In other words, using the phrase frequently heard, the transfer charge was not "reflected into the interior." This was affirmed or admitted by all the traffic officials of other roads who were called to testify, with the single exception mentioned.

In this connection we are asked to consider the apparent absence of complaint by rival dealers respecting the arrangement in question. The shippers of grain from Union Pacific stations, other than Peavey & Co., are quite numerous, and the business of some of them must be of considerable extent. In the aggregate they handle nearly forty per cent of the grain originating on that system. Of the 202 country elevators on the Union Pacific in Nebraska, only 71 appear to be operated by Peavey & Co.; and of the 182 in Kansas, only 40 are owned by that concern. This shows a competitive interest of substantial proportions. The failure of competing shippers to make known their grievances, if they have any, or to so much as send a letter of remonstrance to the Commission, is some indication that they have not regarded the payment of these transfer charges as an undue preference to Peavey & Co. The Freight Traffic Manager of the Union Pacific positively asserts that no

10 I. C. C. REP.

shipper has complained to his company, and nothing has occurred in the course of the inquiry to suggest that he is misinformed or mistaken in that regard. But this elevator arrangement must have been known for a considerable time to other grain buyers upon the Union Pacific system and elsewhere. It was publicly disclosed before the Commission at Kansas City in 1902 and appears then to have been generally understood. The first hearing in this case, at Chicago in June, 1903, when the written contract was produced, was the subject of newspaper report which gave extended publicity to these transfer charges and to the fact that they were under investigation. There is little doubt that the main features of these contracts, or at least the amounts paid thereunder for the transfer of grain, were long ago brought to the knowledge of competing shippers on the lines of the Union Pacific and to other buyers of grain in that part of the country. Yet no shipper has volunteered to come forward or been produced as a witness to sustain the accusation of unlawful conduct. The Commission is aware that wrongdoing has often been suspected in connection with elevator allowances at various points, and is likewise aware that those who obtain such allowances appear to control the greater part of the grain business. For this reason it is somewhat surprising that the competitors of Peavey & Co. have failed in this proceeding to offer any objection to the transfer charges received by that firm, if those charges are believed by them to operate to their disadvantage. So far as their silence has any significance it would seem to discredit the claim that Peavey & Co. are excessively paid.

Against evidence of this character is proof of the amounts said to be paid for transfer at various points and under conditions of alleged similarity. There is more or less shovel transfer at one place and another at a cost stated to range from \$1.25 to \$1.75 per car. The Rock Island pays at Kansas City \$2.00 per car for cars under 50,000 pounds, \$2.25 for cars over 50,000 pounds and under 60,000, and \$2.50 for cars over 60,000 pounds. The Atchison pays \$2.00 per car to a small elevator at Argentine, near Kansas City. The Burlington produced a contract for the construction of a large elevator at Harlem,

across the river from Kansas City, and the transfer of grain by the parties agreeing to erect the same for \$1.75 per car, but it appears that nothing has been done to carry out this contract. Moreover, it contains a provision, as we understand it, that if transfer charges at Kansas City are made greater "*by custom or otherwise*" the owners of the elevator "shall have the right to withdraw from this arrangement for transfer." The Vice-President of the Burlington also stated that his company owned an elevator at East St. Louis, where grain was transferred *at a profit* for one quarter of a cent per bushel. There is no question that in so testifying he expressed his honest belief at the time, but it is fairly certain that he was mistaken. A statement subsequently filed by him, purporting to show the actual performance of that elevator for the year ending June 30, 1903, shows a total of 4,057,224 bushels of grain transferred during that period. At $\frac{1}{4}$ cent per bushel this would give gross receipts for *transferring* of only \$10,143.06. As the elevator is stated to represent an investment of over \$250,000, it is evident that it did not and could not make money in transferring grain at $\frac{1}{4}$ cent per bushel, however profitable its *entire business* may have been during that year.

Taking into account the whole evidence bearing upon the question and giving due consideration to all the facts disclosed, we are unable to find that the amount paid Peavey & Co. for transferring grain is unreasonable under the circumstances surrounding the Union Pacific. No reason is suggested why the arrangement should not be presumed to be just and fair, and nothing has been shown, in our judgment, to overcome that presumption. It may be that the needs of the Union Pacific do not require such large and expensive elevators, and that the necessary transfer could be effected by other means and with a smaller expenditure. Even if that be so, and at most it is quite uncertain, we would not be warranted in finding the carrier guilty of wrong-doing unless something substantial appeared, which we do not perceive, to impeach the honesty of the transaction. So far as we can see, these transfer contracts were made in good faith, for the legitimate protection of the Union Pacific, and there is failure of proof of any unlawful purpose con-

10 I. C. C. REP.—21.

nected with the arrangement. True, the Burlington says it would be willing to make the transfer without charge, but that of course would be upon condition that it secured the carriage of the transferred grain. To obtain the traffic and consequent earnings it might very likely afford to stand by its offer, but that is far from proving that the price paid to Peavey & Co. exceeds the actual or reasonable cost of performing the service.

Some testimony was given as to the feasibility and expense of what is called shovel transfer. This method may be cheaper under favorable conditions and for a limited volume of business, but for the extensive grain traffic of the Union Pacific it is of doubtful economy and otherwise unsatisfactory. The only efficient and adequate mode of transfer is through elevators of large capacity located at the terminals where the transfer is to be made. This being so, it was proper and legitimate for the Union Pacific to enter into the arrangement in question; and that arrangement, from the standpoint of the carrier's interest, was expedient and desirable.

Undoubtedly the general business of Peavey & Co. is greatly benefited by the ownership of these elevators, and this they freely admitted. As a practical matter they need at some point a large amount of storage room, where grain can be graded and "blended," or held to await favorable market conditions at points of destination. These and other like advantages are secured to them by operating the two elevators at Council Bluffs and Kansas City, and for this reason they can well afford to transfer grain for the Union Pacific at a price which otherwise they would not be willing to accept. As a transfer proposition pure and simple, taking into account the cost of these elevators and the expense of their operation, it would not seem to be attractive; by reason of its incidental aid to the extensive business of these grain merchants it is undoubtedly a very profitable arrangement.

It should perhaps be added that no allowance is made by the Union Pacific to any country elevator whether owned by Peavey & Co. or by other parties. As we understand the matter the only elevators to which allowances are made are the terminal elevators described in this report. It is also the fact that no

charge is made by Peavey & Co. in any case to roads taking the transferred grain from these elevators for carriage to destination.

This brings us to the statement that the real complainants in this case are carriers directly competing with the Union Pacific or operating in the same general territory. These carriers allege, as above stated, that the transfer charges paid to Peavey & Co. are excessive and unreasonable, and that they have the effect of an illegal discrimination in favor of that firm and against other shippers of grain. They also say, and this is perhaps the main ground of their objection, that if these charges are not unlawful, and the Union Pacific continues the arrangement indefinitely, they will be obliged to make similar allowances for a like service at points where the transfer of grain may by them be deemed necessary. We quote again from the brief already referred to as follows: "*If the allowance be permitted to stand the other railroads in the competitive territory must necessarily meet it in dealing with their patrons, or suffer their patrons and themselves to be placed at a constant disadvantage, with the tendency of creating in that territory a grain buying monopoly in favor of the Peavey elevators and a grain haul monopoly in favor of the Union Pacific Railroad Company.*"

With reference to this aspect of the matter it may be mentioned that in one important respect the conditions at Kansas City are unlike those at Council Bluffs. Kansas City is a grain market. A large portion of the grain carried to that point is sold there, actually changes ownership there, after the manner of a grain market, although most of it is then taken on to other destinations. For this reason, grain at Kansas City becomes subject to competition between all the lines leading easterly and southerly therefrom, some of which do not extend west of the Missouri River. On this account, it is said, the roads bringing grain to Kansas City lose control of it, so to speak, at that point and the transportation is continued by connecting lines. In other words, the originating roads which extend through to Chicago, for example, like the Atchison and the Burlington, have no advantage in this respect over originating roads which

10 I. C. C. REP.

terminate at Kansas City, because of the general buying and selling which there takes place, and because through rates to the east are the same as the combined rates in and out of Kansas City. It was testified by officials of the Atchison, the Burlington and the Missouri Pacific that the amount of grain taken out of Kansas City by their respective lines is small in comparison with the amount which they severally carry to Kansas City in the first instance. Consequently, they say that they are under as much compulsion to transfer grain at Kansas City, for the release of their equipment and other purposes, as is the Union Pacific at either of its eastern terminals. Therefore, they must provide the same facilities or make the same allowances for grain transfer at Kansas City, and perhaps other places, as may escape disapproval in this proceeding in the case of the Union Pacific. Whether this be true to the extent claimed is not altogether certain, but it may be assumed to be so without affecting the legal question involved because, in our view of the law, the materiality of the fact is not apparent.

CONCLUSIONS.

However objectionable the arrangement in question may appear from any point of view we are convinced, rather against our original impressions, that it cannot be adjudged unlawful. This conclusion follows from our determination of the controlling facts and there is no occasion for extended comment. We have found that these contracts for transferring grain were made in good faith and for a legitimate purpose, and that the compensation paid is not unreasonable for the service performed. The parties were competent to contract, the thing done is proper and necessary to protect the interests of the carrier, the consideration is not excessive and the honesty of the transaction is unimpeached.

Assuming the correctness of these findings, which seem to us to be required by the evidence, we are constrained to hold that no violation of law has been established. It may be that Peavey & Co. as grain shippers secure important advantages over their competitors by reason of these elevator allowances, and this we think is at least the probable effect of the arrange-

ment, but it does not follow that the Union Pacific is chargeable with disregard of its legal obligations. If this carrier had the right to contract for the transfer of grain at its eastern terminals, which appears to be undisputed, and if the contracts were made in good faith and the amount paid fair and reasonable, all things considered, so that the required service is obtained at no greater cost than would otherwise have been incurred, as we have substantially found, how is the transaction rendered unlawful by the circumstance that the parties contracted with are grain shippers who *as such* may be greatly benefited by the arrangement? The Union Pacific was not debarred from dealing with Peavey & Co. because they happen to be grain merchants as well as elevator proprietors. It was open to the carrier to do this work itself, by its own agencies and employees, or to hire it done by others if deemed more expedient; and there was nothing to prevent an honest bargain with whomsoever would undertake to furnish the desired facilities, not excluding those who were also important shippers. This being so, the Union Pacific is not legally at fault or guilty of wrongdoing because it turns out, as an incidental result, that the persons employed to transfer grain are thereby aided more or less in another line of business in which they are engaged. This in effect, as we think, decides the question presented.

It is urged, however, by other carriers, claiming to be in the same situation as the Union Pacific, that refusal to condemn the transfer charges paid by that company will oblige them to make similar allowances for like service at Kansas City and elsewhere. This apprehension on their part may be well founded, but how does that alter or affect the legal rights of the respondent? The law imposes no duty upon the Union Pacific to safeguard the business of its competitors or the shippers they serve. Granted that the allowance to Peavey & Co. places these other carriers, and grain dealers on their lines, at some commercial disadvantage, that it introduces an element of competition which they will be forced to equalize—and that would seem to be its character so far as rival roads are concerned,—on what theory can the Commission interfere so long as the obligations of the Union Pacific to its own shippers are not dis-

10 I. C. C. REP.

regarded? Plainly, as it seems to us, the indirect effect of the arrangement upon other lines or those who patronize them, whatever that effect may be, is no more a violation of the Act than would be a reduction of the *rate* by the Union Pacific which a competing road, in justice to its shippers or in its own interest, might feel compelled to meet. Any resulting injury or detriment to rival carriers is something which the law does not and perhaps should not seek to prevent.

It is scarcely needful to add that arrangements of the kind investigated in this proceeding are not favorably regarded. When anything directly connected with the public service which a carrier is bound or undertakes to perform is farmed out, so to speak, to one of its own shippers, the relation thereby brought about is likely to excite distrust and to be looked upon with suspicion. The provisions of the regulating statute may not be violated, because any resulting discrimination may not be undue, but the situation created cannot be wholly satisfactory. Under existing conditions the transfer of grain through elevators at various points seems to be a virtual necessity both to the grain carrier and the grain dealer; but we are not unmindful of the fact that the persons to whom these elevator allowances are made appear to control a very large share of the grain business. As a practical matter this may be unavoidable, nor is it necessarily unlawful, but the methods adopted and now in vogue in this regard are liable to abuse and therefore not to be encouraged. In this case, however, we are persuaded, upon the facts disclosed and our view of the law, that no requirement of the act has been disregarded and that the respondent carrier is entitled to a dismissal of the complaint.

10 I. C. C. REP.

No. 726.

NEW ORLEANS LIVE STOCK EXCHANGE
v.
TEXAS & PACIFIC RAILWAY COMPANY.

Decided June 25, 1904.

Defendant's rate on beef cattle in carloads from Ft. Worth, Tex., to New Orleans, La., is 42½ cents per 100 lbs. and \$15 per car additional when shipment is made in lots of less than ten carloads. Upon complaint against the imposition of the additional \$15 per car, *Held*: That the charge of \$15 per car in addition to the rate of 42½ cents per 100 lbs. is unreasonable when applied to single carload shipments.

A. H. Isaacson and C. H. Rice for complainant.
T. J. Freeman for defendant.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, *Commissioner*:

The complainant is a voluntary association of commission merchants engaged at New Orleans, Louisiana, in the sale of live stock. No question is made as to its competency to prosecute this proceeding. The defendant operates a line of railway extending from Fort Worth, Texas, to New Orleans, and the complaint puts in issue the reasonableness of its rate upon beef cattle between those points, which is, in carload lots, 42½ cents per hundred pounds plus a charge of \$15 per car when shipment is made in less than ten carloads. The complainant points out three particulars in which this rate is alleged to be in violation of the Act to regulate commerce. First, it is unreasonable and unjust to the extent of the \$15 per car. Second, it discriminates against New Orleans in favor of St. Louis and other similar

10 I. C. C. REP.

localities in that no charge of \$15 per car is imposed on shipments to those localities. Third, it discriminates in favor of the large shipment and large shipper as against the smaller.

Rates were first filed with this commission in April, 1887, and the first rate on beef cattle from Fort Worth to New Orleans was \$85 per standard car. On May 28 a rate of \$82.50 was applied to cars over 33 feet in length. On July 3, 1888, the rate was made \$92 per car 36 feet in length, and this rate continued in effect until February 10, 1889, when rates by the hundred pounds were established, that upon beef cattle being 40 cents. Between September 29, 1889, and May 20, 1891, these rates fluctuated from 39 cents to 34½ cents per hundred pounds. Beginning May 20, 1891, the rate was 39 cents per hundred pounds until March 12, 1897, when it was reduced to 34 cents. February 1, 1899, it was advanced to 36½ cents. December 15, of the same year, it was further advanced to 39½ cents and on March 5, 1903, it was made 42½ cents. The additional charge of \$15 per car was first imposed October 15, 1903. The minimum weight applicable to a car of 36 feet is now and has been since rates by the hundred pounds were put in effect, 22,000 pounds, which at 42½ cents per hundred is higher per car of that size than at any rate which has prevailed for the last 17 years, and during all that time no additional charge of \$15 per car or any other amount has been made.

The line of the Texas & Pacific Railway extends from El Paso, Texas, through Fort Worth to New Orleans. Grades to the west of Fort Worth are very heavy and the cost of operation is high. For the first 150 miles east of Fort Worth the ruling grade is something over one per cent. Between Marshall and Boyce, a distance of some 140 miles, the maximum grade is .8 per cent while from Boyce to New Orleans there is practically a water grade. The traffic from Fort Worth to Marshall is much heavier than between Marshall and Boyce or Boyce and New Orleans. The testimony showed that the movement from Boyce to New Orleans would not exceed about 30 carloads per day, except during the cotton season. The engine which handles a train of 23 cars between Fort Worth and Marshall, and perhaps 27 or 28 cars from Marshall to Boyce can handle 60 cars from Boyce

10 I. C. C. REP.

to New Orleans, and it was said that in the economical operation of the road it was necessary to allow freight to accumulate at Boyce until a full train load could be obtained, and that this did not permit the running of a through train every day in the week at certain seasons of the year.

The distance from Fort Worth to New Orleans is approximately 500 miles. The distance to Kansas City is about the same, while to St. Louis it is 700 miles. The present rates from Fort Worth to Kansas City on beef cattle are 36½ cents and to St. Louis 42½, and this relation in rates between New Orleans, Kansas City and St. Louis has been substantially what it now is, for some years past. On April 1, 1904, the Texas & Pacific withdrew from all joint rates upon live stock but previous to that time it had been a party to such rates from points upon its line to both Kansas City and St. Louis as above. Rates from points in Texas 500 miles and over west of Fort Worth to Fort Worth are 25 cents per hundred pounds. This rate, however, is not the voluntary act of the defendant company but is established by the Texas Railroad Commission.

All shipments of live stock from Fort Worth to New Orleans in which this complainant is interested are offered in lots of less than ten carloads. It was said in testimony that no shipment of that size, except certain train loads for export, had ever been made. Practically, therefore, the rate applied to all such traffic is 42½ cents plus the charge of \$15 per car. The reasonableness of the 42½ cent rate is not put in issue by this complaint, and upon that no opinion is expressed. The allegation is that the additional charge of \$15 per car is unreasonable and this contention we think is well taken. The rate without the addition of this amount is the highest ever exacted since these rates were published. For 17 years this defendant voluntarily maintained a lower rate. The rate of 42½ cents per hundred pounds is higher than that ordinarily applied to the transportation of beef cattle for distances of 500 miles; under the ruling of the Texas Commission, but 25 cents per hundred pounds could be charged for that distance. The cost of operation from Fort Worth to New Orleans is not excessive. While the grades are considerable for a portion of the way, they are easy over the 10 I. C. C. REP.

greater part of the haul. The defendant seems to claim that it ought to be allowed to charge a high rate because if it sends this live stock through in proper time it can not consolidate its trains at Boyce; but it is a novel idea that the rate should be advanced because the cost of operation over a part of the line is decreased, and it certainly costs less per mile to haul the same train from Boyce to New Orleans than from Fort Worth to Marshall. It is said that the cost of operation has increased and that this justifies an increase in the transportation charge, but this rate had already been advanced in less than five years from 34 to 42½ cents. We feel clear that the imposition of this additional charge of \$15 is unreasonable under the first section.

The defendant states that excessive damages are claimed by Texas shippers with respect to the shipment of live stock; it apparently insists that these damages are unjust and that it is compelled to recoup itself by an advance in the rate. This Commission can hardly find that a judgment rendered in due course of judicial procedure is unjust or excessive. Nor can we assume that this defendant has been coerced into payment of unreasonable or unjust damages by the bringing of such suits. The fact, however, that claims of that kind are made in large amounts, that such claims are often compromised by the carriers, that when not compromised they result in large verdicts and that as a consequence the carrier is obliged to pay large sums for damage to live stock in transit is undoubtedly proper to be shown. It is an incident in the transportation of that commodity, which may properly be taken into account by the railway in establishing its tariff. If for any reason these claims for damages have become more frequent than they were formerly, without fault upon the part of the railway, that might be a reason for increasing the rate. It should be carefully observed, however, that the defendant ought not by this means to escape from its own negligence. The testimony in this case showed that from three to six days were usually consumed in transporting live stock from Fort Worth to New Orleans, a distance of 500 miles. Apparently a much less time ought to suffice. The defendant itself admitted that over three days ought not to be consumed. If six days are used and if the stock is in fact injured

by this delay, it is difficult to see why damages ought not to be claimed and collected. The consequences of such neglect should fall upon the owners of this property, not the public. To the extent that loss or damage is peculiar to a particular kind of traffic that fact may be properly recognized in the rate, but charges of transportation should not be advanced to make good the negligence of the carrier itself.

Our impression is that these claims for damages have multiplied in recent years, and that the amount which the defendant is obliged to pay on that account has increased. Evidently the figures given by the defendant for the year 1903 are abnormal. It is not suggested that any such condition has existed in the past and it is hardly credible that it will continue for the future. The record does not disclose the reasons for it, and we find nothing in that record which convinces us that the advances already made before the imposition of this charge of \$15 per car would not fairly compensate the defendant for the increased hazard in this respect in so far as the shipper can be justly charged with it.

The complaint alleges that since no similar charge is imposed on shipments to St. Louis and other markets, out of this arises a discrimination, under the third section, against New Orleans. Formerly the defendant was a party to rates to other markets than New Orleans, but since April 1, 1904, these joint rates have been canceled. Whether under these circumstances it could be said that the defendant discriminates against New Orleans, since it does not participate in the rates to the other markets, or whether New Orleans is in such competition with these other markets, in fact, that discrimination could be predicated of a difference in rates is not here determined.

Neither do we find it necessary to decide in this case whether the imposition of this charge in lots of less than ten carloads, while not applied to ten carloads or more is in violation of the Act to regulate commerce, either as a matter of law or as a matter of fact in this particular case. We find that the charge of \$15 per car is unreasonable when applied to single carload shipments.

It must not be understood as the opinion of this Commission that the defendant is obliged to receive single carloads of live stock at Fort Worth for shipment to New Orleans at any and all

10 I. C. C. REP.

times. The service required by this species of traffic is peculiar and exacting. The defendant may with propriety appoint a certain day or days upon which it will run trains for the accommodation of this traffic and shippers should accommodate themselves to this schedule, if reasonable service is thereby afforded. Such an arrangement is for the mutual interest of the railway and the shipper.

CONCLUSIONS.

Upon the foregoing findings of fact the defendant should be ordered to cease and desist from imposing the present charge of \$15 per car above the rate of 42½ cents per hundred pounds.

10 I. C. C. REP.

No. 724.

C. M. BARROW

v.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD
COMPANY and THE ILLINOIS CENTRAL RAIL-
ROAD COMPANY.

Decided June 25, 1904.

Defendants' rate on horses and mules in less than carloads from Bayou Sara, La., to St. Louis, Mo., is the double first class rate of \$1.80 per 100 lbs. upon an estimated weight of 2,000 lbs. for the first animal, 1,500 lbs. for the second, and 1,000 lbs. for each additional animal. The distance covered is 667 miles. This rate when applied to the transportation of a single animal is not unreasonable, but it is unreasonable for a shipment of four animals, amounting in that case to \$99, while the charge upon a carload of 25 animals is only \$100. Defendants' less than carload tariff would be rendered more just by reducing the charge to 90 cents per 100 lbs., the first class rate, increasing the estimated weight of the first animal to 4,000 lbs., and leaving the weights for the additional animals as they now are, at 1,500 lbs. for the second and 1,000 lbs. each for all others included in the shipment. No order issued, but complainant may apply to Commission for reparation if compelled to pay rates in excess of those indicated.

Ed Baxter for defendants.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, *Commissioner*:

The complainant resides at Bayou Sara in the State of Louisiana and complains of the rates of the defendants upon horses and mules from that point to St. Louis, Missouri. The Southern Classification, which is in force over the lines in question,
10 I. C. C. REP.

provides that horses, mules and horned animals shall be carried at estimated weights which are 2,000 pounds for the first animal, 1,500 pounds for the second animal and 1,000 pounds for each additional animal. The rate of the defendants upon live stock from Bayou Sara to St. Louis is \$1.80 per hundred pounds. The complainant insists that these estimated weights are greatly excessive, and, therefore, unjust, that the charge per hundred pounds is unreasonably high, and claims that the defendants should be obliged to transport live animals between these points for 80 cents per hundred pounds upon actual weights.

The above estimated weights are undoubtedly in most instances excessive but it cannot be said that they are for this reason unjust. The two other principal classifications name estimated weights upon live stock; those of the Official being 4,000 pounds for the first and 3,000 pounds for each subsequent animal; of the Western 2,000 pounds for the first, 1,500 pounds for the second and third, and 1,000 pounds for each additional animal. The fixing of an estimated weight is in effect a method of providing that a given article shall be carried for a certain price. The defendants might with propriety provide that live animals should be transported for so much a head, and this is virtually done by the estimated weight. The real question is not whether the weight as estimated is excessive, but whether the transportation charge produced by applying the rate to the weight is an unreasonable one.

The rate in force upon live animals between Bayou Sara and St. Louis is \$1.80 per hundred pounds, which is just double the first class rate. Applying this to the estimated weight of the first animal we have as a resulting charge for the carriage of that animal \$36. This hardly seems to us unreasonable. The distance is 667 miles. Ordinarily an entire car is used, for while it is probable that certain kinds of freight may with safety be placed in the other end, an entire half of the car must be appropriated to the use of this animal and as a practical matter the whole of the car generally is. If the time occupied in transit is more than 28 hours, as it would be between the points in question, the animal must be taken out, fed, watered and rested.

The liability to damage is greater in case of live animals than of most other commodities.

Live stock must from its very nature be transported long distances at a comparatively low rate, but the carriage is ordinarily, and ought to be, in carloads. There is comparatively little necessity for moving live stock distances of 500 miles and over in less than carload lots. We cannot feel that these defendants ought to be required to haul this car, weighing not less than 20,000 pounds, almost 700 miles, assuming the liability and discharging the other duties required, for less than \$36.

While it seems to us, however, that in case of a single animal the application of the rate of the defendants to the estimated weight complained of, does not produce an unreasonable charge, this is not true as the number of animals increases. The complainant desired to ship four horses. The estimated weight of this shipment would be 5,500 pounds and the freight would aggregate \$99. The carload rate on horses and mules between St. Louis and Bayou Sara in either direction is \$100 per car, on horned animals \$75 per car, and this carries with it, as we understand the testimony, the transportation of an attendant. It is not claimed that these carload rates are too low, and it seems to us that if \$100 is a fair compensation for transporting twenty-five horses, which is about an average carload, together with an attendant, \$99 is too much for transporting four horses with no attendant. The car may perhaps weigh the same in either case, but the total weight of the full carload is considerably more, the actual cost of hauling is more, the expense of unloading and reloading is greater.

In our opinion a more just tariff would result if the present commodity rate of \$1.80 per hundred pounds were reduced to the regular first class rate of 90 cents and the estimated weight of the first animal increased from 2,000 to 4,000 pounds, the estimated weight of the second and subsequent animals remaining at 1,500 and 1,000 pounds as they now are. This would yield the defendants less than the Official but more than the Western classification.

10 I. C. C. REP.

CONCLUSIONS.

While it has been found as a fact that the charges of the defendants are in some instances unreasonable, it is difficult to see how that finding can be given effect through any formal order. The commission can only direct carriers to cease and desist from imposing rates now in effect; it has no power to prescribe the rate which shall be put into effect. No attempt will be made, therefore, to formulate an order. If the complainant should hereafter be compelled to pay rates in excess of those here indicated he can apply to the Commission for reparation.

10 I. C. C. REP.

No. 710.

DENISON LIGHT & POWER COMPANY.

v.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

Decided June 25, 1904.

Defendant's rate of \$1.90 per ton on coal, lump and slack, from South McAlester, I. T., to Denison, Tex., a distance of 97 miles, is unreasonable and unjust, and should not exceed \$1.25 per ton. Order withheld for specified period. Matter of reparation to complainant also reserved.

J. R. Cullinane for complainant.

C. Haile for Missouri, Kansas & Texas Ry. Co.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, *Commissioner*:

The complainant is a Texas corporation engaged in manufacturing and selling gas and electric current at Denison in that state. In its business it uses large quantities of coal which it procures mainly at South McAlester, Indian Territory, and which is transported from that point to Denison by the defendant railway company.

The complaint alleges that the rate charged from the McAlester district is unreasonable, and also that it discriminates in favor of Dallas, Texas, against Denison in that, although the distance to Dallas is more than twice as great as to Denison the rate is but slightly higher. The testimony shows, however, that competitive conditions exist at Dallas which force the lower rate to that point upon the defendant, and we do not think that the case presents any question of discrimination. The sole issue

10 I. C. C. REP.—22.

to be considered is the inherent reasonableness of the rate from the McAlester district to Denison.

Rates on lump coal and slack between these points for the last twelve years have been as follows:

Date	Lump	Slack
Oct. 24, 1891	\$1.20	\$1.20
Nov. 2, 1899	1.55	1.55
Nov. 20, 1899	1.80	1.80
Feb. 15, 1903	1.90	1.50

The rate last given is in effect at the present time.

The distance from South McAlester to Denison is 97 miles, and the two points are connected by the main line of the defendant. Its traffic manager, who represented that company upon the hearing, stated that there were no unusual grades; that traffic was as dense upon that portion of his line as upon most other parts of the system; and that the cost of operation was in no respect unusual or excessive.

Coal is among the most desirable kinds of traffic. The reasons for this have been several times stated by the Commission and need not be repeated here in detail. The cost of receiving, transporting and delivering that commodity is less than in case of almost any other article of freight. Its value is not great, the hazard of loss in transit is insignificant, it is an article of universal necessity in daily life, and as a steam fuel it furnishes the basis of many other industries.

Coal rates in this country are usually highly competitive, and this fact, together with its desirability as traffic, and the large quantities which are moved have produced on the average a very low rate. It was said on the part of the defendant that its average rate per ton-mile received for the transportation of coal was about 6 mills. We have carefully examined the coal rates prevailing in different parts of the country for similar distances. The rate per ton of 2,000 pounds for a distance of 100 miles prescribed by the Railroad Commissions of Missouri, Illinois and Iowa is \$1.00; that fixed by the Texas Commission is \$.90 when the haul is over one railroad and \$1.05 when two or more railroads participate. While the Minnesota rates are not before us it is our recollection that they do not exceed these

10 I. C. C. REP.

figures much if at all. Upon the other hand some cases can be found where rates nearly as high as those in question are charged for a similar service, and under circumstances where such charges ought not to exceed, nor indeed equal those which this defendant might make here.

Manifestly the present rate is too high. As already said, the average rate upon the defendant system received for the transportation of coal is but 6 mills per ton-mile, and its average rate on all traffic was only 9.59 mills for the year ending June 30, 1903. This rate of \$1.90 yields nearly 2 cents per ton-mile. Nothing appears in the cost of movement or otherwise which calls for an especially high rate.

What the rate should be is a more doubtful question. We feel that the charge of \$1.20 per ton, which the defendant voluntarily maintained in effect for the eight years previous to November 2, 1899, ought not, probably, to have been increased. That rate is more than 25 per cent higher than the defendant would be allowed to charge if both these points were located in the State of Texas, and 20 per cent more than if the transportation were wholly in Illinois, Missouri, or Iowa. It is probably more than would be allowed by this Commission if it were a rate-making body, establishing both competitive and non-competitive rates; but that duty has been left to the carrier itself, and we can only interfere when satisfied that, on the whole, the rate in effect is unreasonable. The traffic manager of the defendant stated that a reduction of 50 cents per ton in the present rate would force a reduction in other coal rates amounting in the aggregate to \$20,000 annually; and this, it must be borne in mind, is a reduction from the net revenues of the company. It was also suggested that the cost of operation had increased, and that this justified an advance over the rate in effect before 1899. Assuming, without deciding, that this defendant company may properly increase its charges to meet increased cost of operation, we doubt whether the advance ought to have been made in case of this traffic. The coal rate from the McAlester district to Denison is non-competitive. It was already a high rate. If any rate were to be increased, it should have been, rather, those which competition in the past had forced down. The effort

10 I. C. C. REP.

should be to bring about a better relative adjustment. That carriers have now such control of competitive rates that this can be done is shown by the fact that in several cases now pending before us, to which the defendant is a party, such advances have been made and maintained. In the Wichita coal case, 9 I. C. C., 558, we allowed a rate of \$1.50 per ton for a distance of 178 miles to stand, although expressing an opinion that it was probably too high. On the whole, we are inclined to hold that the present rate on coal and slack per ton of 2,000 pounds from the McAlester district to Denison ought not to exceed \$1.25.

Slack is in one sense a by-product of the coal mine. It can only be used for steam purposes, and is worthless unless it can be marketed for that use. This often leads to the making of extremely low rates upon that commodity; but the defendant insists that this should be left to the discretion of the carrier to deal with as it would deal with any other competitive condition. It was said that very little slack was produced at these mines. Rates were the same on lump and slack until February 15, 1903; and, without attempting to lay down any general rule, we do not feel justified in holding in this case that the rate on slack should be lower than that above indicated for lump coal; at the same time large quantities of slack are used in Denison, the price of that commodity may determine whether an industry can exist there, and if this defendant, in deciding what rates are to be borne by the entire product of these mines, should name a rate on slack somewhat lower than that above indicated, and a rate on lump coal somewhat higher, this Commission would not probably quarrel with that adjustment.

The complainant asks reparation on account of shipments made since August 1, 1901. The testimony shows the total amount of lump coal and the total amount of slack shipped since that date. There is no claim upon the part of the defendant that a higher rate could properly have been imposed at any time since August 1, 1901, than at the date of the hearing, which was April 21, 1904, and we find that \$1.25 would have been a reasonable rate during that period. The complainant would, therefore, be entitled to reparation in an amount equal to the difference between this rate and the rate actually paid by it.

From August 1, 1901, to February 15, 1903, the rate paid by the complainant upon both lump and slack was \$1.80 per ton. Since February 15, 1903, the rate has been \$1.90 for lump and \$1.50 for slack. Inasmuch as the record does not show the amount of lump and slack shipped before and since February 15, 1903, there is no basis for a computation of the amount due.

CONCLUSIONS.

Upon the foregoing findings of fact the complainant is entitled to an order that the defendant cease and desist from charging the present rates. As is well understood the Commission has no power to name a rate for the future, and its finding as to what rate would be reasonable is, therefore, only equivalent to a recommendation in that respect.

The complainant would be entitled to an order for reparation, if the record was sufficiently definite to enable us to ascertain the amount due. We will hold the case open until September 1, without making any formal order. If the tariffs of the defendant have not been by that time readjusted and the complainant still desires to proceed with the matter of reparation, we will permit further testimony upon that branch of the case and make the proper orders.

10 I. C. C. REP.

No. 696.

GARDNER & CLARK
v.
THE SOUTHERN RAILWAY COMPANY.

Decided June 25, 1904.

1. Defendant has had in force since April 25, 1903, rates per 100 lbs. on bananas in carloads from Charleston, S. C., which are 43 cents to Danville, Va., and 35½ cents to Lynchburg, Va., the transportation to the latter point by defendant's line being through Danville. The lower rate to Lynchburg is forced upon defendant by the competition of bananas coming from Baltimore. The 43-cent rate to Danville is not found to be unreasonable and upon these facts the higher rate to Danville is not in violation of the Act to regulate commerce.
2. Prior to April 25, 1903, defendant had in effect rates per 100 lbs. on bananas in carloads from Charleston which were 43 cents to Danville and 20 cents to Lynchburg. The rate of 20 cents to Lynchburg was 13 cents below the rate which was justified by competition from Baltimore or elsewhere. Such relation of rates was in violation of sections three and four of the Act to regulate commerce, and complainants upon the shipments made at the 43-cent rate to Danville are entitled to recover reparation to the extent of 13 cents per 100 lbs., such excess amounting upon complainants' shipments to \$130.
3. Upon 17 carloads of bananas defendant allowed complainants to ship between May 1, 1902, and April 25, 1903, from Charleston to Lynchburg and unload half of the carloads at Danville, paying the Lynchburg rate plus the local rate on the half carloads carried from Lynchburg to Danville. This was in disregard of defendant's regulations and resulted in charges below those applicable under defendant's published tariff. Complainants seek reparation upon the basis of the Lynchburg rate and defendant upon the basis of its tariff rate, but neither is entitled to recover.

Geo. C. Cabell and *B. H. Custer* for complainants.
Claudian B. Northrup for defendant.

10 I. C. C. REP.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, *Commissioner*:

D. B. Gardner and W. W. Clark, the complainants, are engaged in the commission fruit business at Danville, Va., under the firm style of Gardner & Clark. In the course of their business they ship bananas in carloads to Danville where distribution is made in small lots to retail dealers located in that city and adjacent territory. The Southern Railway transports these bananas to Danville and the complainants put in issue the rates charged for that service as compared with similar rates to Lynchburg and Richmond.

Bananas consumed by these three cities may and sometimes actually do enter the United States at the ports of Mobile and New Orleans, being transported from there by rail. This movement is, however, insignificant and may be disregarded in the present discussion. Bananas supplying these three markets come in mainly through the ports of Charleston, South Carolina, and Baltimore, Maryland. The complainants and their witnesses stated that, generally speaking, the price was the same at both these ports and that the freight rate would determine whether bananas for Lynchburg or Richmond should move through Baltimore or Charleston. If the rate made were lower from Baltimore by any appreciable amount they would ordinarily move from that port.

The present rates from Charleston are as follows, in cents per hundred pounds:

To Danville	L. C. L.	74	C. L.	43
" Richmond	"	50	"	25
" Lynchburg	"	50	"	35½

From Baltimore the present rates are:

To Danville	L. C. L.	58	C. L.	46
" Richmond	"	25	"	20
" Lynchburg	"	42	"	35½

The carload minimum from Charleston is 20,000 pounds, from Baltimore 18,000 pounds. Bananas can only be shipped to Danville by the complainants in carload lots and we are only concerned in this case with the carload rate.

The rates from Charleston, as above given, have been in effect since April 25, 1903. For some years previous to that date the carload rate from Charleston to Lynchburg and Richmond was 20 cents per hundred pounds, the other rates being the same as at present. The existence of this 20-cent rate to Lynchburg was accounted for as follows: The first attempt to move bananas through the port of Charleston was made in 1898. At that time the Southern Railway did not reach Charleston from Lynchburg and Danville over its own iron, but operated in connection with the South Carolina & Georgia, which was the initial line. This line at that time established a rate to Richmond of 20 cents and made the same rate to Lynchburg upon the assumption, apparently, that those two cities took the same rate from points north. Such was in fact the rule as to most commodities but not as to bananas, the carload rate, Baltimore to Richmond being at that time 17 cents and to Lynchburg 33 cents. In point of fact no bananas actually moved through Charleston until April, 1902. Previous to that time the Southern had obtained control of the South Carolina & Georgia and, therefore, operated the entire distance from Charleston to Lynchburg. This relation of rates at Lynchburg was not, however, brought to the attention of the traffic officials of the defendant company until about the time it was advanced, April 25, 1903. About April 1, 1903, the Richmond rate from Baltimore had been advanced from 17 to 20 cents and the Lynchburg rate from 33 to 35½. The Charleston rate was now advanced to 25 cents at Richmond and 35½ cents at Lynchburg.

The movement of bananas from Charleston to Lynchburg is through Danville, and the contention of the complainants is that the defendant by charging a lower rate to Lynchburg than is charged to Danville, an intermediate point, discriminates against the latter locality. The defendant justifies the lower rate to Lynchburg on the ground of competition which does not prevail at Danville. This claim of the defendant is apparently well founded. In the case *Danville v. Southern Railway Co.* 8 I. C. C. Rep. 409, this Commission fully examined the traffic conditions existing at Danville and Lynchburg, reaching the conclusion that there was in fact competition at Lynchburg which

might justify a lower rate in most instances to that city than obtained at Danville. The testimony in this case clearly shows that what was there found to be true of traffic in general is true of this particular species of freight. The rate on bananas from Baltimore to Richmond and Lynchburg is determined by competitive conditions entirely independent of the defendant. The rates prevailing from Baltimore to those points would be substantially the same if bananas were never carried there from Charleston. It has already appeared, and indeed it was conceded by the complainants upon the hearing, that the Southern Railway could not transport bananas from Charleston to Lynchburg unless it made substantially the same rate of freight as was charged from Baltimore to Lynchburg. In other words this defendant must accept the rate which it now does upon this traffic or retire from that business.

The complainants insist, secondly, that the rate charged from Baltimore to Danville is unreasonable in itself. We hardly think that claim is made out upon this record. The kind of service required in the transportation of bananas is a somewhat exacting one. While not usually carried under refrigeration a special ventilated car is needed. They must be handled with great expedition and in point of fact the Southern does transport them from Charleston to Richmond and Lynchburg and intermediate points by an express freight service which approximates a passenger schedule. The liability to damage is considerable and it appears that claims for damage are frequently made.

An examination of the tariffs in force in different parts of the country shows that bananas in less than carload lots are usually carried as second class, in carload lots as third class. The L. C. L. rate on this commodity from Charleston to Danville is 74 cents, the regular second class rate, but the C. L. rate of 43 cents, that being the one really in issue, is considerably lower than third class, which is 61 cents. To hold this rate unreasonably high we must either conclude that the classification applied to this commodity generally is wrong, or that the entire system of class rates upon this part of the Southern system is too high. We should be hardly warranted in reach-

10 I. C. C. REP.

ing either of these conclusions in the present case. While the rate cannot be called a low one it seems to be about in line with similar rates elsewhere and can hardly be pronounced unreasonable.

The complainants claim, in the third place, that even if the present rate is reasonable and the present relation of rates lawful, this was not the case while the rate to Lynchburg was 20 cents per hundred pounds.

The complainants began shipping bananas from Charleston about May 1, 1902, and from that date until April 25, 1903, the Lynchburg rate was 20 cents, the Danville rate being then the same that it now is. During all that time the rate from Baltimore to Lynchburg was 33 cents. Assuming that the defendant must meet and might lawfully meet the Baltimore rate to Lynchburg, the complainants urge that there were no competitive conditions which required the making of a rate of 20 cents or indeed a lower rate than 33 cents. The defendant does not seriously contend that its rate of 20 cents at Lynchburg was forced by competitive conditions. The manner in which it was first established has already been stated; its continuance seems to have been an oversight. We find as a matter of fact that from May 1, 1902, until April 25, 1903, there were no competitive conditions at Lynchburg which required or justified the naming of a lower rate than 33 cents from Charleston. The present rate is 35½ cents, but it will be remembered that just before that rate was put in effect the rate from Baltimore had been advanced from 33 to 35½ cents. Richmond may be omitted from our consideration since the same conditions control there and at Lynchburg.

Between May 1, 1902, and April 25, 1903, the complainants shipped five carloads of bananas from Charleston to Danville upon which was paid \$86 per car, being 43 cents per hundred pounds upon a minimum of 20,000 pounds. The first of the expense bills produced dated May 15, 1902, shows upon its face that the rate was computed at 41 cents, the total amount being \$82, but we think it fairly appears from the testimony that this error was subsequently corrected and the full rate paid. If the complainants are entitled to recover as damages the dif-

ference between the rate actually maintained by the defendant at Lynchburg and the lowest rate which it might justly maintain at that point, viz., 13 cents per hundred pounds, their damages upon these five cars would amount to \$130.

The complainants testified that the maintenance of the lower rate at Lynchburg restricted their territory and that for this reason they were unable to do as extensive a business as they otherwise would, or as they in fact did after the Lynchburg rate was advanced. We find that the complainants were damaged as stated by them, but there is nothing in this record from which the amount of such damages can be estimated.

During this same period from May 1, 1902, to April 25, 1903, the complainants handled 17 carloads, minimum weight 20,000, between Charleston and Danville and Lynchburg in the following manner and under the following circumstances:

Not being able to dispose of an entire carload of bananas at Danville it occurred to the complainants that they might handle part of the car at Danville and sell the remainder at Lynchburg. They accordingly purchased a carload of bananas at Charleston and ordered the same shipped to Lynchburg. They then applied to the station agent at Danville for permission to open the car when it reached that point, remove one half the contents and send the balance on to Lynchburg. The local rate from Lynchburg to Danville at that time upon 10,000 pounds or over was 28 cents per hundred pounds, and the complainants stated to the agent that if allowed to remove one half the contents of the car they would pay the local rate on 10,000 from Lynchburg to Danville for that privilege. The station agent thereupon telegraphed the assistant general freight agent of the defendants at Richmond for instructions, and was notified that he might grant the request of the complainants in this instance, but that such course of action must not be extended to the future. The complainants knew that the station agent had wired Richmond and received instructions from there to grant their application; they did not know that the agent was instructed to limit the privilege to that single shipment.

When this car arrived at Danville the complainants opened it, removed one half the contents and sent the balance on to Richmond I. C. C. REP.

mond. The station agent at Danville made out an expense bill showing a shipment of 10,000 pounds of bananas from Lynchburg to Danville at 28 cents per hundred pounds, which the complainants paid.

This proceeding was repeated during the period before named in case of 16 other carloads. The station agent of the defendant at Danville knew of and permitted what was being done. His superiors had no knowledge of it and gave orders to discontinue the practice as soon as it was brought to their attention. The rule of classification then in force on the defendant's line over which this traffic moved prohibited the removal of any portion of a carload shipment *en route* unless the less than carload rating was applied both to the quantity removed and the remainder of the carload.

CONCLUSIONS.

The carload rate of 43 cents per hundred pounds from Charleston to Danville has not been found to be unreasonably high in itself, and it has been found that the lower rate of 35½ cents per hundred pounds from Charleston to Lynchburg is forced upon the defendant by competition which it does not and cannot control, and which justifies a lower rate at Lynchburg than Danville. Upon these findings of fact the rates now in effect are not in violation of the Act to regulate commerce according to those judicial decisions which have been often referred to and need not be again cited here.

The real question presented by this record is as to the rights of the complainants, under the tariff in force previous to April 25, 1903. It will be remembered that up to that date the rate to Lynchburg was 20 cents, which has been found to be 13 cents per hundred pounds below what was justified by competition from Baltimore or elsewhere. It is plain that the relation of rates existing during that period between Danville and Lynchburg was in violation of the third and fourth sections of the Act to regulate commerce. During the period the complainants made shipment of five carloads of bananas to Danville upon which they paid a rate of 43 cents per hundred pounds, and

that has been found to be a reasonable charge in itself. To what damages then is the complainant entitled?

The Act to regulate commerce provides that railway charges shall be reasonable and it further provides that the relation of the charges imposed upon different shippers shall be just. These complainants are interested in the relation rather than in the absolute reasonableness of the rate. It is a matter of no special concern to the fruit commission merchant at Danville whether the rate on bananas is a few cents more or less per hundred pounds, but it is of vital importance to him that his rate shall be no higher than that of his competitor either at Danville or at an adjacent point of distribution. These complainants have shown that the low rate to Lynchburg enabled dealers located in that city to invade the territory naturally tributary to Danville and thereby restricted their field of operations and prevented them from transacting business at all at certain points. While it has been found as a matter of fact that the business of the complainants was unfavorably affected by the rate granted their competitors at Lynchburg, there is no evidence, and it is difficult to see how there could be satisfactory evidence to show the amount of the damages sustained by the complainants on that account.

We do not think, however, that the complainants are for this reason precluded from all claim to damages. The defendant has accorded to the competitors of the complainants at Lynchburg a rate 13 cents per hundred pounds lower than it lawfully might; it must, therefore, give the complainants the same reduction in rate. The complainants should be allowed upon all shipments made by them a deduction of 13 cents per hundred pounds from the rates actually paid. This is the only measure of damages which can possibly be applied; to refuse this is to entirely excuse the defendant from the consequences of its unlawful act and to deny the complainants all remedy for the injury which they have sustained. The application of such a rule inflicts no hardship upon the defendant since it is simply required thereby to maintain such a relation of rates as the law directs; it does not afford the complainants complete relief, for while the rate which they are finally compelled to pay is the

10 I. C. C. REP.

just one, the recovery allows nothing for the business which they have in the meantime lost.

This rule of damages was applied by the Commission in the somewhat similar case, *Board of Trade of Lynchburg v. Old Dominion Steamship Co.* 6 I. C. C. Rep. 632, 646, and was adopted by the English courts after most elaborate discussion. *Denaby Main Colliery Co. v. Manchester, Sheffield & Lincolnshire Railway Co.* L. R. 11 App. Cas. 97. The defendant railway in that case extended from the southern Yorkshire coal fields to Grimsby and transported from those fields to that point coal for one Bannister and also for the complainant, the Denaby Company. The coal at Grimsby was sold for land delivery and also for water shipment to various points. There was an established rate which was ordinarily charged both to Bannister and to the Denaby Company alike, but it appeared that when Bannister made shipment of this coal to certain ports on the English coast, a rebate of 6d per ton was allowed, and that when he made shipment, by the Hamburg-American steamers to the West Indies a rebate of 8d per ton was granted. These allowances were made for the purpose of enabling Bannister to develop a trade in those sections.

The Denaby Company claimed that this allowance to Bannister was illegal and sought to recover a large sum in the way of damages. The court below held that the granting of the rebates was in violation of the provisions of the English act, but that inasmuch as it did not appear that the Denaby Company had ever made shipment of coal to these English ports or to the West Indies, or had ever desired to make such shipment, or had ever applied to the defendant for a rate applicable to coal for such shipment, and inasmuch as the Denaby Company and Bannister had paid exactly the same rate upon coal which they had in fact sold in competition with each other, no damages were recoverable. The House of Lords reversed this latter holding. Its conclusion apparently was that the facts presented a case of overcharge. The law required the defendant to carry for all shippers at the same rate; it had in fact allowed Bannister a rebate of 6d upon certain shipments and 8d upon certain other shipments; it must carry the same quantity for the Denaby

10 I. C. C. REP.

Company at the same price, and if it had in fact exacted a higher charge, must make refund to that extent.

That case is much stronger than the one before us. Here the competitors of the complainants at Lynchburg were accorded upon all shipments for the space of about one year a rate 13 cents per hundred pounds lower than the law permitted. During that period the complainants were obliged to pay upon their shipments 13 cents per hundred pounds more in comparison with the rate of their competitors than they should have paid. They should now be allowed to recover as damages the excess so paid by them which amounts in the present case to \$130.

Both parties claim to recover in respect of the 17 carloads which were partly unloaded at Danville, but in our opinion neither is entitled to anything in that behalf. While the complainants have apparently paid for the transportation of bananas from Lynchburg to Danville which were in fact never transported, the result to them is the same in money and more favorable in convenience than as though the entire carload had been sent to Lynchburg and the half reshipped.

According to the published schedules of the defendant the complainants should have paid the less than carload rate from Charleston to Danville upon the 10,000 pounds which were taken out there and the less than carload rate to Lynchburg upon the remaining 10,000 which went through and this would aggregate considerably more than the freight actually paid. If the car had been opened and the half taken out without the knowledge or consent of the defendant it might probably now recover the schedule rate, but the defendant must be held in this case to have consented to what was done. If the complainants have not in fact paid the lawful rate the defendant was a party to the illegal transaction and can claim no benefit from its own wrong.

The defendant will be ordered to pay the complainants on or before August 1, 1904, the sum of \$130 with interest from April 24, 1903.

10 I. C. C. REP.

No. 632.

JOHN W. BLACKMAN, JR.,
v.
THE SOUTHERN RAILWAY COMPANY.

No. 639.

JOHN W. BLACKMAN, JR.,
v.
THE COLUMBIA, NEWBERRY & LAURENS RAIL-
ROAD COMPANY.

Decided June 29, 1904.

1. A railroad freight depot and a public storage warehouse are not used for similar purposes, and the charge for storage in the railroad depot may properly be made higher than the public warehouse charge with the object of compelling the expeditious removal of freight.
2. The So. Ry. Co. in applying to complainant's interstate traffic at Macon, Ga., the storage rates prescribed by the Georgia Railroad Commission, and the C. N. & L. R. Co. in applying to complainant's interstate traffic at Columbia, S. C., the storage rates prescribed by the South Carolina Railroad Commission, although such storage rates were in excess of the usual public warehouse charges in Macon and Columbia, did not violate the Act to regulate commerce.
3. Storage rates and regulations enforced by common carriers subject to the Act to regulate commerce must be published at their stations and filed with this Commission.

James McConnell for complainant.

Ed Baxter and *Claudian B. Northrup* for the Southern Ry.
Co.

Ed Baxter for the Columbia, Newberry & Laurens Railroad
Company.

10 I. C. C. REP.

REPORT AND OPINION OF THE COMMISSION.

FIFER, *Commissioner*:

John W. Blackman, Jr., is a dealer in sugar and molasses, whose principal office is in New Orleans, Louisiana, and who ships the goods, in which he deals, by railroad from that city to market points in other states of the United States. In this petition he sets forth that about November 1, 1901, he shipped by the line of the Southern Railway Company and other railway lines connecting therewith, five barrels of sugar from New Orleans to Macon, Georgia, the five barrels weighing 1920 pounds; that, the sugar having arrived at Macon on or about November 25, 1901, the consignees refused to accept the shipment, and owing to a decline in market price, complainant was unable to dispose of the sugar until on or about February 6, 1902, during which time it remained in the depot of the defendant, the Southern Railway Company, that this defendant compelled complainant to pay for transporting and storing the sugar the published rate for transportation, and in addition \$11.85, which charge was made for storage.

The complainant avers that this charge for storage was unreasonable and unjust, and that a reasonable and just charge for the service would have been 60 cents.

It is further set forth by the complainant that the defendant is a member of the Southeastern Car Service Association, composed of railway companies doing business in Georgia, Florida, and South Carolina, and has established rates and regulations for the storage of freight in the depots of its members, which rates and regulations are enforced by defendant at its depot in Macon, Georgia; and it is averred that by virtue of these rules and regulations the charge made for storing sugar in barrels is one cent per day for each 100 pounds, which is excessive, unreasonable and unjust; that the charges exacted by other common carriers who do business in States other than Georgia, Florida, and South Carolina, for storing sugar in barrels is four cents per barrel for each month; that the defendant had the right to charge for storage on the sugar as it remained over the time limit, but that it had no right to charge more than the usual public

10 I. C. C. REP.—23.

warehouse charges in force at Macon, which were and are much lower than one cent per 100 pounds per day.

It is alleged that no charge for storage is published by the defendant as a terminal charge, although such publication is required by the Act to regulate commerce. It is alleged that by charging the complainant \$11.85 as stated, and by exacting rates for storage as already set forth, the defendant has been and is violating the Act to regulate commerce.

The complainant prays that after hearing and investigation an order may be made commanding the defendant to cease and desist from the aforesaid violations of the Act to regulate commerce and to make reparation to the complainant for the storage charges unlawfully collected.

The same complainant John W. Blackman, Jr., also makes a complaint against the Columbia, Newberry & Laurens Railroad Company similar to that against the Southern Railway Company, and in respect to the unlawful collection by the defendant railway of \$3.85 storage on 10 barrels of molasses from New Orleans to Columbia, South Carolina.

In the matter of this complaint relief is asked from the Commission in terms the same as those used in the complaint against the Southern Railway Company, and the two cases have been and will be considered together.

FACTS.

The complainant shipped five barrels of sugar from New Orleans, Louisiana, to Macon, Georgia, over the line of the Southern Railway Company and connecting lines. Owing to a misunderstanding as to the terms of sale of the sugar, the consignment remained in the defendant's depot at Macon about two months beyond the time limit allowed by the company, and a storage charge of \$11.85 was laid upon the sugar, the payment of which was exacted upon the delivery of the shipment by defendant.

The complainants shipped ten barrels of molasses from New Orleans, Louisiana, to Columbia, South Carolina, over the line of the Columbia, Newberry & Laurens Railway Company and connecting lines. There was a misunderstanding as to terms of

sale and, during the adjustment of the matter, six or seven days elapsed over the time allowed by the railroads, and an extra charge for storage was made amounting to \$3.85.

Both of the defendant railroads are members of the Southeastern Car Service Association, formed for the purpose of controlling charges for storage. A circular issued by this Association July 18, 1901, fixes storage charges for time periods beyond the free limit allowed by the various railways, as follows: For 5 days and under, 1 cent per 100 pounds per day; 5 to 10 days, 6 cents; 10 to 20 days, 8 cents; 20 to 30 days, 10 cents; 30 to 40 days, 13 cents; 40 to 50 days, 15 cents; each additional week or fraction thereof, 10 cents per 100 pounds; minimum charge 5 cents; not more than \$1.00 per day for any consignment not in excess of a carload, \$1.00 per day being the demurrage charge per car.

The storage regulations in effect on the lines of the Southern and of the Columbia, Newberry & Laurens Railroad Company in Georgia and South Carolina are enforced by the adoption by these carriers of the rates and regulations prescribed by the Railroad Commissioners of these States.

The defendant, the Southern Railway Company, publishes through the Southeastern Car Service Association, and files with the Interstate Commerce Commission, the rates and regulations for storage prescribed by the Georgia Railroad Commission and adopted by this defendant in its practice. The defendant, the Columbia, Newberry & Laurens Railroad Company, does not publish through the Southeastern Car Service Association nor file with the Interstate Commerce Commission the rates and regulations for storage charges which, as to Columbia, S. C., the destination involved in this proceeding, are those prescribed by the South Carolina Railroad Commission.

The New Orleans Car Service Association fixes a tariff for storage in New Orleans affecting all roads entering that city. These rates are lower than those of the Southeastern Car Service Association. The tariff of the New Orleans Car Service Association imposes on all freights except hay, grain, and shipstuffs for the first 15 days after the free limit, 1 cent per 100 pounds and for each additional 10 days or a fraction thereof, $\frac{3}{4}$ -cent
10 I. C. C. REP.

per 100. The complainant calculates that had the storage on his two shipments been assessed in accordance with the New Orleans Car Service Association tariff instead of the Southeastern, the total charges to be paid thereon would have been in the proportion of $2\frac{1}{2}$ cents to 10 cents.

The storage charges assessed in both cases of which complaint is made were in accordance with the rules of the Southeastern Car Service Association. Exhibits on file with the records in these cases show that the rates for storage fixed by the Southeastern Car Service Association for points in the State of Georgia are the same as those prescribed by the State Railroad Commission of that State; also that the association's rates in the State of South Carolina are those fixed by the Railroad Commissioners of that State.

Previous to the adoption of the present scale of storage charges by the Southeastern Car Service Association, when there was no fixed and uniform rate of storage, the depots of the railways were burdened and congested by accumulations of freight in less than carloads, so much so that, in many cases, the buildings were so crowded that it was impossible to shelter from the weather the current traffic and to handle the business of the stations from day to day.

In numerous instances depots were so congested that, in order to gain access to freight which had been in the buildings for some time, it was necessary to remove and take out of the buildings large quantities of other freight of more recent arrival, necessitating expensive handling and the liability of damage to the goods.

Consignees, especially brokers, allowed goods to remain indefinitely in the depots, in many instances until purchasers were found, sometimes the goods being peddled out in small lots. The enforcement of the present storage rates has had the effect of relieving this congestion, the only freight which is now detained in depots being that shipped to consignees who decline to accept it on account of differences arising between shippers and consignees, as in the cases in these complaints.

The object of the Southeastern Car Service Association in fixing its schedule of rates was to induce or compel consignees to

unload cars promptly and remove freight from the depots as speedily as possible, thus facilitating the regular station business and preventing discrimination as between persons. Prior to the adoption of the association rules, the defendant railways were compelled to hold goods until the consignees removed them or until they could sell them for charges.

The association charges were not made, and do not provide, for revenue, the defendants claim, because when freight is handled and rehandled, as it must be in cases of congestion, the expense is greater than the income derived from its storage. Aside from these considerations, the railways, as the result of congestion in depots, are liable to suits of damages for injuries to goods in the handling and from exposure to the weather, it being often the case that it is impossible to get goods under cover.

There is nothing to prevent the consignee, should he wish to do so, from removing goods from a depot to a public warehouse, where they would be subject to regular warehouse rates; but this transfer would involve drayage charges. The railways are not in the warehouse business, all their depot space being required for current business, and the storage rules and tariffs are adjusted with the object of securing freedom from blockade.

In practice the "free limit" of storage is about three days—a little more than that in South Carolina. Consignees at a distance from a station are allowed more time than those not so far away. If a shipment is refused the shipper is notified at once. If a shipment is unclaimed for 30 days the shipper is notified, in which case the storage tariff has been running for all the time beyond the "free limit." The charge begins three days after the time of service of the notice.

The defendants claim that the storage rates imposed by them are reasonable in view of the object which by the imposition and collection of such rates it is desired to accomplish.

CONCLUSIONS.

We cannot agree with the contention of the complainant in this case that the defendants had no right to charge for the storage of the freight in question more than the usual public ware-

10 I. C. C. REP.

house charge in force at Macon, Georgia and Columbia, South Carolina.

A railroad freight depot and a public storage warehouse are buildings whose business and uses are wholly dissimilar. The former is planned and built to accommodate the current business of the railroad when expeditiously handled, and affords no facilities for storage during long periods of time. The storage warehouse is especially designed for storage purposes. The railway company imposes storage charges, not for gain especially, but in order that it may be enabled to clear its depots, to the end that current business may not be blockaded. That this object may be effected it is, in our view of the matter, justifiable and necessary to impose a rate higher than that fixed by the public storage warehouse, and if this was not done, there would be no inducement for the removal of goods from the depot to the public warehouse. The business public is as much interested as the railroad in having goods removed from cars and depots within a reasonable time after they reach their destination.

Another fact which renders storage in a railway depot expensive and risky is, that owing to the daily movement of goods into and out of the depot, goods in storage are subject to the risk of damage which often results in loss to the railroad as well as to the owner of the goods.

The rate enforced in the two instances involved in this proceeding appears to be reasonable, in consideration of the object to be attained by its imposition. It is in each instance the rate prescribed by the Railroad Commission of the state in which the storage was collected, which affords some proof that the rates and regulations complained of are not unreasonable.

Any rule which in its general application is beneficial may in particular instances work a hardship, but this does not afford a sufficient reason for declaring the rule, in itself, unreasonable.

The rates and regulations for depot storage which have been adopted by the Southern Railway Company are properly published by that road in their tariffs on file with this Commission; but this is not done by the other defendant, the Columbia, Newberry & Laurens Railroad Company.

There is no complaint, however, that the required notice was

10 I. C. C. REP.

not served upon the consignee before the storage charges were advanced under the rule, and we assume, therefore, that the required notice was given.

In view of these considerations, we hold that the rates and regulations as to the storage in depots prescribed by the defendants are not violative of the Act to regulate commerce. We hold, however, that the defendant, the Columbia, Newberry & Laurens Railroad Company, must publish its rates and regulations as to depot storage, and unless this is done within a reasonable time, that company will be proceeded against with a view to the enforcement of this requirement. As to all other questions the proceedings in both cases are hereby dismissed.

10 I. C. C. REP.

IN THE MATTER OF CHARGES FOR THE TRANSPORTATION AND REFRIGERATION OF FRUIT SHIPPED FROM POINTS ON THE PERE MARQUETTE AND MICHIGAN CENTRAL RAILROADS.

1. It is the duty of the respondent railroad companies engaged as common carriers in transporting fruits from points in Michigan to furnish refrigerator cars for such service, but such duty arises out of their common law liability, not under the Act to regulate commerce, and redress for failure to fulfill it must be sought in the courts.
2. The respondent railroad companies may provide refrigerator cars by purchase or by lease, and if the latter plan is adopted they may make contracts with one company which exclude the use of cars owned by other companies.
3. Carriers should, in the opinion of the Commission, be legally compellable to furnish ice for the refrigeration of refrigerator cars used upon their lines, but if it is not part of the obligation of a common carrier to provide such refrigeration, when it does furnish it and at the same time prohibits the shipper from obtaining it from any other source, the charge for refrigeration is part of the total charge for transportation furnished by the carrier, and must be reasonable.
4. When charges for refrigeration are applied in the transportation of perishable freight, such charges should be published and adhered to exactly as all other charges for transportation are published and observed. The same considerations of justice and public policy which require this in case of the freight rate apply to the charge for refrigeration.
5. The respondent railroad companies entered into contracts with the respondent, the Armour Car Lines, to furnish them with refrigerator cars for use in the transportation of fruit from points in Michigan and to refrigerate the cars when used for such transportation. Under the contracts the use of other cars in that business is prohibited and the service of refrigeration is performed exclusively by the Car Lines Company. The railroad companies formerly furnished refrigeration without any charge in addition to the freight rate, and they subsequently made a charge for refrigeration substantially equal to the cost of the icing. Acting under the contracts the Car Lines Company exacts charges for the refrigeration service which greatly exceed those formerly made to cover the cost of icing by the railroad companies and

range from 50 to 150 per cent above those made prior to the contracts by the Car Lines Company itself. The total cost of transportation to the shipper has been thereby very largely increased. *Held*, That the railroad companies, by making these exclusive contracts, in effect impose upon shippers exorbitant charges for the transportation of Michigan fruits to markets in other states in violation of section one of the Act to regulate commerce. Further action withheld to allow readjustment of charges by the respondent companies.

Martin S. Decker for the Commission.

Roger S. Powell for Duluth Consignees.

Jesse F. Orton for Grand Rapids Shippers.

A. R. Urion for Armour Car Lines.

Charles McPherson for Pere Marquette Railroad Company.

Ralph M. Shaw for Michigan Central Railroad Company.

REPORT AND OPINION.

PROUTY, Commissioner:

This investigation was undertaken by the Commission upon its own motion in consequence of numerous complaints from various shippers and growers of Michigan fruit to the effect that the Pere Marquette Railroad Company and the Michigan Central Railroad Company had, by requiring the exclusive use of Armour cars, materially increased the cost of moving the fruit to market. The two above-named railroad companies and the Armour Car Lines—that being the company which owns and operates the cars in question—were made parties to this proceeding. A hearing was held in Chicago on June 2, 3, and 4, 1904, at which all the above-named parties were represented and at which several of the persons complaining also appeared and were heard.

The fruit growing section of Michigan lies adjacent to the Lake, extending from the southern boundary of the State as far north as Traverse City, being bounded upon the east by the line of the Grand Rapids & Indiana Railroad. This region produces peaches, pears, plums, grapes, and berries of all kinds, of excellent quality and in great abundance. The industry has largely increased during the last fifteen years, and is susceptible of still further development if profitable markets can be found. These fruits are for the most part highly perishable. They

10 I. C. C. REP.

can be shipped short distances in cars arranged to admit the air freely, and known as ventilated cars, without ice, but when carried any considerable distance or for any considerable length of time they must be transported in refrigerator cars in which the temperature can be artificially cooled. This is desirable in case of peaches when the period of transportation covers even less than a single day, and is absolutely essential when the time is longer. Different fruits differ in this respect, grapes, for example, carrying much better than peaches or berries.


A considerable part of this fruit section is tributary to the Pere Marquette Railway System as now constituted, and that company is much the largest carrier of the product. During the season of 1903 about 6,000 carloads of fruit originated on that system. The Michigan Central came next with about 600 carloads; and it is understood that one or two other railways, not parties to this proceeding, also originated such shipments to a more limited extent. When the industry was in its infancy the fruit was disposed of in nearby markets, of which Chicago was the principal one, Milwaukee being second in importance. With its growth more distant markets were sought. At the present time Michigan fruits go east to the Atlantic seaboard, south to the Ohio River, west into Iowa, and as far as Duluth and St. Paul in the northwest.

At first refrigerator cars were little used, but as markets widened they necessarily came into demand. Of the 6,000 carloads originated by the Pere Marquette in August, September and October, 1903, nearly 1,700 moved under refrigeration, and of the 600 originating on the Michigan Central about 450 were iced. The fruit season in Michigan extends over some three months, but the active shipping season is confined to six weeks. A car occupies on the average about four weeks for a round trip. Considerable difference of opinion existed as to the number of refrigerator cars which the defendant railroads would require for the proper handling of this traffic. The Traffic Manager of the Pere Marquette said that he would not dare to begin the season with less than 2,500 available. This is plainly too high. It seems probable that from 800 to 1,000 cars should be in sight at the beginning of the season in case of

that company. The Michigan Central would require a much less number. In neither case would the number be constant, since shipments differ greatly from year to year.

The Pere Marquette owns in all 110 refrigerator cars, and of these about 50 are required in its dairy service. Until the season of 1902 that company had been accustomed to obtain the refrigerator cars required in its fruit business for the most part from its connections. As the demand for such cars became large, this method proved unsatisfactory. The main difficulty was the impossibility of obtaining cars enough. A particular railroad would only furnish refrigerators for shipments to points upon or over its own line. This made it difficult for the Pere Marquette to place orders in such a way as to accommodate its customers, since it is impossible to tell long in advance where the best market will be, and was often inconvenient to the shipper himself. Carloads of fruit are frequently sold on track at the point where they are loaded, and it does not always happen that the shipper knows when he orders his car for loading to what point shipment will finally be made. If he has loaded the car of one line, he cannot change the destination to a point upon some other line. To relieve itself of annoyance and to improve the service the Pere Marquette Company, at the beginning of the season of 1902, entered into a contract with the Armour Car Lines by the terms of which the Car Lines agreed to furnish all the refrigerator cars which the railroad company might require for shipment under refrigeration to any point of destination, and to assume all charge and liability in respect of icing, while the Railroad Company, upon its part, agreed to pay the Car Lines Company three-fourths of one cent per mile for the entire distance which the car moved over its line, and not to permit the use of any other cars than those of the Car Lines Company for the shipment of fruits under refrigeration to points of destination beyond its own rails. This contract was renewed in December, 1902, for the two succeeding seasons, and is now in effect. In 1902 Grand Rapids, owing to certain competitive conditions, was excepted from the operation of the contract; but the competitive conditions have since been removed and Grand Rapids

10 I. C. C. REP.



is treated the same as other stations. Previous to the season of 1903 the Michigan Central Railroad Company entered into an arrangement with the Armour Car Lines similar in all respects to that with the Pere Marquette Company, and for the same reasons. It was further said that other railroads operating in that territory had the same sort of exclusive contract with the Armour Company, so that at the present time only the cars of that company are available for the shipment of Michigan fruit to most points beyond the limits of that State, excepting the important markets of Chicago and Milwaukee.

The Armour Car Lines is a corporation owning and operating a large number of refrigerator cars, those devoted to the fruit business being about 6,000. It seems to be in effect a consolidation of the Fruit Growers' Express, the Kansas City Fruit Express, and the Armour Refrigerator Line. The stock of the corporation is nearly all owned by the interests controlling Armour & Company; and the same persons who own this stock also own the stock of the Continental Fruit Express, which has about 1,500 fruit cars. While the Continental Fruit Express seems to be operated as an independent company, there is at the present time a practical unity of control in the operation of that and the Armour Car Lines Company. The different railroads of the United States own more or less refrigerator cars, but these are devoted to the traffic of the system to which they belong. Many such cars are owned by individual persons or corporations, but as a rule the number belonging to any one individual is comparatively small, and the cars are usually devoted to the business of the owner. The American Refrigerator Transit Company and the Santa Fe Refrigerator Despatch Company each own a considerable number of refrigerators; but the former operates principally upon the Gould lines and the latter devotes its equipment mainly to the transportation of fruits and vegetables from California over the Santa Fe System. It seems probable that the Pere Marquette and the Michigan Central Companies could not have contracted with any other refrigerator company except the Armour Car Lines for an adequate supply of these cars.

The representative of the Car Lines stated that his company would not at the present time permit the use of its cars upon

any railway originating fruit shipments unless it did so under an exclusive contract like those in question. It would appear, therefore, that these defendant companies must either pick up refrigerator cars from their connections, as they did previous to the making of the present arrangement, or obtain them, as they do now, from the Armour Car Lines, or purchase and own themselves an adequate supply.

Rates on fruits from Michigan points to most destinations have remained the same for the last six years. At first the railroads furnished both the refrigerator car and the ice for this rate. Later, in 1901 and 1902, they charged, in addition to the rate, for the actual cost of the ice, assuming whatever care might be necessary in seeing that the car was properly iced. It would appear that under this arrangement each railroad looked after the icing upon its own line only. When the car left the Pere Marquette, for example, its connection assumed the burden of seeing that the icing was properly done. Under the contracts in question the Car Lines Company takes the entire charge of the icing to destination. It often happens that cars must be iced at one point for loading at another; it sometimes happens that after a car has been iced and placed for loading it will not be used, or at least that there will be such delay in its use as will necessitate another icing before it starts upon its journey. All this was formerly a matter of trouble and expense to the Railroad Company, but is now cared for entirely by the Car Lines Company. When notice is given the Armour Car Lines that a car will be required for loading at a certain point upon a given day, it looks after all details. If the car is iced but not loaded, the Car Lines Company loses the expense of icing. To discharge this duty that company maintains in Michigan during the fruit season a considerable staff of employees. It keeps at stations where cars are being loaded some representative who sees that the cars are properly refrigerated, and superintends the loading of the fruit itself. It does not appear that the employees of the Car Lines Company assist the shipper in actually putting the fruit into the car, or that the work of loading done by the shipper is any less or any different now from what it was under the old arrangement; but the

10 I. C. C. REP.

Armour Company claims that in order to furnish a suitable refrigerator service, which will insure reaching destination in good order, it is necessary for it to superintend the management of these cars from the beginning. When the car has been loaded and started, it is still, until its arrival, under the constant supervision of the Car Lines Company.

It has already been said that the Railroad Company pays the Armour Car Lines Company three-fourths of a cent per mile, both ways, for the use of the car. In addition to this the Car Lines Company charges the shipper a certain sum for refrigeration. This sum the shipper must pay or he cannot obtain the use of a refrigerator car; and the real complaint here is that the amount thus exacted is excessive. The force of this contention will be seen from two or three illustrative examples.

The rate on peaches from Grand Rapids to Boston is 79 cents per hundred pounds, with a minimum of 20,000 pounds. Previous to 1900 this included the cost of refrigeration, so that a carload of peaches could be shipped from Grand Rapids to Boston for \$158.00. Subsequently the cost of the ice was charged in addition to the rate, and this seems to have averaged not far from \$20.00 per car, making the total charge \$178.00 per car. At the present time the Armour Car Lines refrigerator charge is \$55.00, making the total cost of transportation \$213.00, an increase of \$55.00 per car, or more than 33 $\frac{1}{3}$ per cent. over the rate in effect four or five years ago.

The Paw Paw Fruit Growers' Union raises fruit in the vicinity of Paw Paw, which it ships largely to the southwest, west, and northwest. The rate on peaches from Paw Paw to Dubuque, Iowa, is 55 cents, with a minimum of 20,000 pounds, or \$110.00 per car. Originally this was the entire cost of sending a carload of peaches under refrigeration from Paw Paw to Dubuque. When, subsequently, the ice was charged for, this increased the expense from \$7.50 to \$15.00 per car, according to weather conditions—about \$10.00 per car on the average. The present refrigerator rates are \$37.50, which means an increase of almost 50 per cent. over rates in effect before 1900, and \$25.00 per car over those in force previous to 1902. That

is, this exclusive contract costs the shippers of Paw Paw \$25.00 per car on the average.

Testimony was given as to the cost of shipping grapes from Mattawan to Duluth. In 1902 the rate was 38 cents, minimum 24,000 pounds, to which was added for actual cost of ice \$7.50, making \$98.70 in all. In 1903 the rate was advanced to 48 cents, and the icing charge was \$45.00, making the total cost for the carload \$160.20—an advance of \$61.50.

It will be seen from the above examples, which are fairly illustrative of the general conditions, that the effect of these exclusive contracts has been to materially increase the transportation charge. The defendants claim that this may well be so, since the service now rendered is better than it formerly was; that while the fruit grower may be obliged to pay more, he gets more for his money and is, on the whole, better off. This is stoutly denied by the complainants. Mr. Wildey, of the Paw Paw Fruit Growers' Union, testified that the service formerly rendered from Paw Paw to Dubuque and other points was perfectly satisfactory. His fruit had reached its destination in exactly as good condition as it did now. To him the new service was of no benefit. The same thing was said by shippers from Grand Rapids, and by receivers of Michigan fruit at various points. Upon the other hand, certain fruit growers testified that under the former system their fruit did not arrive in good order, and that they preferred the present arrangement, even with the additional expense. The truth seems to be that under the old arrangement some points were much more favored than others. Mr. Wildey, at Paw Paw, appears to have been able to reach Iowa points over the Illinois Central Railroad, from which he could always obtain a supply of refrigerator cars of an excellent type. As a result, his fruit reached the market in as good condition as now, and at much less expense. So, too, at Grand Rapids competitive conditions were such that shippers there could obtain cars enough. The new system has not materially improved the service at that point, and has materially increased the cost. At non-competitive points and to certain destinations the service in the past has not been equally good. Still we are inclined to think, on 10 I. C. C. REP.

the whole, that the great trouble has been, not in the character of the service, but in the failure of the railroads to provide a sufficient number of cars. The Traffic Manager of the Pere Marquette Company stated that to the best of his recollection no claim had been made against his company for neglect in icing; and the testimony of the General Freight Agent of the Michigan Central Railroad Company was to the same effect. It seems probable that damage, when it occurred, was due to delay in transportation rather than to improper refrigeration. One witness for the complainants said that while his fruit had formerly reached its destination in good order, and while he had little to complain of on that account, and while he regarded the present refrigerator charges as extravagantly high, nevertheless he would prefer the present system, with the increased charge, to the old system with its inadequate supply of cars, to such an extent had he been annoyed and damaged by inability to obtain cars. This appears to exactly express the situation.

We have already seen that many growers and shippers of Michigan fruit testified that they preferred the present service at the higher charge to the old arrangement. The attorney for the Armour Car Lines stated that he could produce one hundred others whose testimony would be to the same purport and we see no reason to doubt this. These witnesses were brought to the hearings without expense to themselves while the complainants were obliged to pay their own car fare and hotel bills, and this might account for the number who appeared; but they were intelligent, were actually engaged in shipping and growing fruit and there is no reason to doubt their honesty. It seems probable that certain sections of this fruit shipping territory, just how much cannot be found, are better off today than they were before 1902; but it should be carefully noted that this is due to the fact that cars were not properly furnished before. Had they been, the exclusive contract would, in any view, be a damage to the fruit grower in all parts of Michigan, since it largely increases the cost of transportation without a betterment in service which is of corresponding value to the shipper.

It is said that the refrigeration charges of the Armour Car
10 I. C. C. REP.

Lines Company are exorbitant; and they certainly do much exceed the cost of the ice under the old arrangement. This may be due to two circumstances. Refrigerator cars are of several types. The ice bunkers in many of those furnished previous to the Car Lines contract seem to have only held from $2\frac{1}{2}$ to 3 tons. The bunkers in the Armour cars hold from 4 to 5 tons, so that the quantity of ice consumed at the initial icing point is greater in the case of the Armour car than with those cars having a smaller ice capacity. Cars of the most approved type at the present time seem to provide a bunker space substantially equal to the Armour car, and we are inclined to think that a car of the proper construction ought to have this capacity. It does not follow, however, that because the bunker is larger and more ice is used for the initial icing proportionately more would be required to carry the shipment to destination. The car might run longer without icing, or, if reiced, as frequently happens, might not require more for this service than the smaller bunker. The testimony apparently shows that the Illinois Central refrigerators contain about the same quantity of ice as the Armour car; and the actual cost of icing these between Paw Paw and Dubuque was only \$10.00 or \$12.00 for the trip.

In the second place, the service rendered by the Car Lines Company does not consist merely in supplying ice. There is in addition to this a supervision which must be rendered by some one, and which is rendered by the Armour Car Lines Company at a very considerable expense. Many of the shippers insisted that this service is of no value to them. They are required to perform the same labor now as they formerly were. To an extent this claim of the shipper is true. The Railroad Company formerly rendered the service which the Car Lines Company now discharges in seeing that the cars were iced and placed for loading, and in keeping them supplied with ice after being loaded. To this extent the arrangement relieves the Railroad Company from this duty, and is a benefit to it. If the rate in effect previous to the season of 1902 fairly compensated the Pere Marquette Company for the transportation of this fruit, then under present conditions it can afford either to accept a less charge for the transportation, since it performs a less

10 I. C. C. REP.—24.

service, or to pay the Armour Car Lines a reasonable amount for performing this service, which it formerly rendered itself. It is said that the Railroad Company gains nothing by this contract, since the refrigeration charges are entirely retained by the Car Lines Company. But this is not true, for the Car Lines Company now renders and exacts pay from the public for rendering a part of the service which was formerly discharged by the Railroad Company, and which was included in the rate.

Upon the other hand, we are inclined to think that this service is of some additional value to the shipper. Refrigeration is something which should be well done, and it is almost of necessity true that on the whole refrigeration provided and looked after under the system applied by the Armour Car Lines Company is of more value to the shipper than the sort of refrigeration which was obtained under the old system. While we think, however, that the shipper may properly be required to pay something more than the actual cost of the ice, in consequence of the improved character of the service, we do not think the added value to him is anything like the increase which he is required to pay under the present arrangement.

Whether the refrigeration charges, considered as compensation for the entire service performed by the Armour Car Lines Company, are exorbitant is a different question. That company purchases its ice for the initial icing in the State of Michigan in most cases in exactly the same way that the Railroad Company formerly did, and at about \$2.50 per ton. This includes delivery of the ice into the car bunkers. Without attempting to examine all these rates for refrigeration, for that would be impossible upon this record, we may select the charges to Boston, which were gone into somewhat more in detail than to other points. It has been seen that the initial icing at Michigan requires some four or five tons. It sometimes happens that the car is reiced before it leaves the point of origin, or at some concentrating point like Grand Rapids. It is subsequently examined and reiced, if necessary, at Detroit, at Buffalo, and at Karner, just west of Albany. The Car Lines Company has no icing plant of its own at Detroit, but purchases ice there, as at other Michigan points, at substantially the same price. It em-

employs one man to inspect the car. It does maintain its own plant at Buffalo and Karner, and since natural ice is readily obtainable in those regions it is safe to say that it does not cost the Car Lines Company over \$2.50 per ton in the bunkers at those points. The amount of ice required depends upon the weather, but it seems probable that an outside estimate would not allow over ten tons in all on the average, making the actual cost of the ice \$25.00. The testimony shows that when shippers paid for the ice the cost was from \$20.00 to \$25.00 per car; and the only one of the Moseley cars, which are hereafter referred to, that went to Boston during the season of 1903 shows charges of \$25.17. Upon a basis of \$25.00 for ice, \$30.00 per car would remain for superintendence. When it is remembered that the Car Lines Company handles the meat and provision traffic of Armour & Company, it will be seen that the cost of inspection per car after the car leaves the State of Michigan must be extremely small, and we do not think the service of superintendence rendered in Michigan ought to justify a charge of many dollars per car there. In 1898 these same cars were operated by Armour & Company between Michigan points and Boston for a total refrigeration charge of \$20.00 per car. We feel clear that the present charge of \$55.00 is excessive.

So, also, of the other points to which attention has been especially called. The cost of ice from Mattawan to Duluth, as shown by at least one actual expense bill, was \$7.50, while the present refrigeration charge is \$45.00. While the cost of ice in case of that carload was without doubt below the average, it seems certain that such average would not exceed \$20.00 per car. The actual cost of ice between Paw Paw and Dubuque, as shown by many actual transactions, ranged from \$7.50 to \$15.00 in cars and in bunkers of the same size as the Armour cars. The refrigeration charge at present is \$37.50. The tariff of 1898, already referred to, names rates of refrigeration to numerous destinations. The rates fixed by the present tariff exceed those by from 50 to 150 per cent. While we have not before us the necessary facts upon which to base a definite opinion in most cases, it is our general impression that these refrigeration charges are excessive.

10 I. C. C. REP.

We also feel that these fruit rates from Michigan points were sufficiently high before the increased Armour charges were added. The rate is usually the first class rate; the shipment is in carload lots, with a minimum of 20,000 pounds. Dairy products as a rule go at the second class rate, with a minimum usually less than that imposed upon these fruit shipments; refrigerator cars are provided, and the cost of refrigeration is included in the rate. The rate on dressed beef from Chicago to New York is 45 cents; the minimum is 20,000 pounds; and the service of transportation in respect of speed, return of cars empty, and the various incidents which enter into the cost of service are almost identical with the shipment of berries. When to the first class rate is added these present refrigeration charges, the cost of transportation becomes exorbitant and, as the testimony shows in this proceeding, prohibitive to some markets.

It has already been suggested that different fruits require different degrees of refrigeration. Peaches and plums require careful attention, while grapes are less exacting. An attempt has been made by the Car Lines Company to recognize this fact by providing what is called half-tank refrigeration. The bunkers in the Armour cars are so constructed that the lower portion can be cut off, thereby reducing the capacity about one-half. When so arranged, about $2\frac{1}{2}$ tons are required to fill the bunkers, which, after being once filled, are kept full by re-icing. A rate is named for this service about two-thirds of that charged for full tank service; but the shipper is required to release the Car Lines Company and the Railroad Company from all liability for damage arising from insufficient refrigeration.

It appeared that a fruit shipper named Moseley, located at Grand Rapids, owned about thirty refrigerator cars of much the same type as the Armour car. He had bought these cars and established concentrating plants, with storehouse facilities, at several points on the Pere Marquette Railroad previous to 1902, under an agreement with that company that it would pay him a mileage of three-fourths of a cent per mile on the run of his cars. He was to furnish his own ice for the initial icing, and to pay for the ice actually used in reicing at other points en route. The Pere Marquette Company, notwithstanding

ing its contract with the Car Lines Company, still allows this shipper to use his own cars from stations where his storehouses are located, paying him mileage as before. When such cars go forward to destination, refrigerating charges the same in amount as those imposed by the Car Lines Company are assessed against the shipment, but settlement is afterwards made with Moseley upon the basis of payment by him for the actual cost of the ice used. The Traffic Manager of the Pere Marquette Company testified that while under these peculiar conditions his company allowed the use of Moseley cars, it would not allow the use of any other refrigerator cars, whether owned or leased for the purpose. A statement of the actual amounts paid by Moseley for ice shows that the cost per car is invariably much less to all destinations, usually about one-half the Armour charges.

CONCLUSIONS.

We think that it is the duty of the respondent railroad companies to furnish refrigerator cars for the transportation of this fruit. While it is possible that these carriers might at the outset have legally declined to provide this special kind of equipment, they ought not to be permitted to do so at this time. For years they have voluntarily made such provision, and this industry has grown up upon the strength of that arrangement. Such cars are generally furnished in all parts of the country when required for this species of traffic. While a refrigerator car costs somewhat more than an ordinary box or flat car, the additional expense is not great. Railroads at this day might as well decline to provide stock cars for the transportation of live stock as refrigerator cars for the carriage of perishable commodities. But this duty does not spring from the Act to regulate commerce, nor has this Commission any jurisdiction of that matter. It arises out of the common-law liability of the defendant railway companies as common carriers, and redress for failure to fulfill it must be sought in the courts.

The defendant railways may provide such cars either by purchase on their own account or by lease from other roads, and if the latter plan is adopted they may undoubtedly enter into exclusive contracts like that before us. This has been settled

10 I. C. C. REP.

by the Supreme Court of the United States. *Pullman Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; *Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628. Still more directly in point are those cases in which it has been held that a railway may provide facilities for receiving and delivering live stock by the making of an exclusive contract with one of two or more stock yards operating at the same point: *Central Stock Yards Co. v. Louisville & N. R. Co.* 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; *Railroad Commission v. Louisville & N. R. Co.* 10 I. C. C. Rep. 173.

Whether the carrier is legally compellable to furnish ice for the refrigeration of such cars is more doubtful. In our opinion it should be. A refrigerator car is worth nothing without ice. These cars are usually employed to transport commodities to considerable distances. While the shipper might attend to the initial icing, he could not, without great difficulty, provide for reicings en route. If the railways were to entirely withdraw from the performance of this service, and to insist that it should be done by the shipper in each instance, it would result in throwing the transportation of perishable commodities into the hands of a few large shippers who could afford to provide the necessary icing facilities. That the carriers can, without great inconvenience, furnish ice is evidenced by the fact that for a long time they have and in many cases still do so. Until 1902 refrigeration was furnished for these fruits by the Pere Marquette, and until 1903 by the Michigan Central. It does not appear that the connections of these lines are unwilling to furnish the same service now. These lines themselves provide ice for the shipment from Michigan points of dairy products and all other commodities except fruits. Charges for refrigeration should be published and adhered to exactly as all other charges for the service of transportation are. There is no consideration of justice or of public policy which requires this in case of the freight rate that does not apply with equal force to the charge for refrigeration.

Granting, however, that there is no liability resting upon a common carrier to provide refrigeration, this must be clear,

10 I. C. C. REP.

that the railway must either furnish ice itself for a reasonable price or permit the shipper to do so. The car is worth nothing without ice, and if the carrier imposes as a condition to the use of the car the payment of an icing charge which is prohibitive, it in effect refuses to furnish the car itself. We have seen that in this case the refrigeration charges imposed by the Armour Car Lines Company are unreasonably high. No refrigerator car can be obtained by the shippers of Michigan fruit for destinations beyond the lines of the Pere Marquette Company without the payment of these charges. By making these exclusive contracts the defendant railways in effect impose upon the shippers of such fruit exorbitant charges for the transportation of their product to market, and we think they thereby violate the first section of the Interstate Commerce Act. While the carrier may be under no obligation to furnish ice, if it does furnish it and does prohibit the shipper from obtaining it from any other source, the price must be reasonable, and that price is a part of the total charge for the transportation service afforded by the carrier.

While, however, we are of the opinion that a wrong exists here, it is doubtful what remedy this Commission can or should apply. It is possible that an order to cease and desist from these exclusive contracts so long as the rates for refrigeration are exorbitant, might be enforceable. The Michigan Central Company intimated upon the trial that if such an order were to be made that company would comply with it; but in that case at the beginning of the present fruit shipping season that company would be left without an adequate supply of cars; and we have expressed an opinion that many, perhaps a majority, of the fruit growers of Michigan are better off under the present arrangement with an adequate supply of refrigerators than they were under the arrangement when cars were not obtainable. It might be said that in such event the shipper could sue for failure to furnish cars, and this is true; but the remedy thereby afforded is not available to most shippers as a practical matter, and is satisfactory to none.

It is possible that we might treat this refrigeration charge made under these exclusive contracts as the act of the carriers

10 I. C. C. REP.

themselves and order them to reduce it, as was done in the Truck Farmers' case—6 I. C. C. Rep., 295. But no general order of this kind could now be made, for we have not examined in detail these refrigeration charges except to three or four destinations. It seems probable that the rate of transportation might properly be reduced, since the railway, by the making of these contracts, compels the public to pay the Car Lines Company for a portion of the service which it formerly rendered and which it now escapes. But here again we have before us no particular rate and can, therefore, make no specific order.

This matter can be much better dealt with by the Car Lines Company and the Railway Companies than by the Commission, and it has been thought best, this being a general investigation, to leave the matter open during the present shipping season. If by the first of next October these refrigeration charges have not been readjusted, the Commission will take further action in the matter, either in this proceeding or by some new proceeding. We strongly feel that the present charges, including the cost of refrigeration, for the transportation of these Michigan fruits are excessive.

Our ideas as to the basis of such readjustment have been already stated in the findings of fact, but may be recapitulated here. We think, in consideration of the more complete service afforded by the Car Lines Company, that the charges for refrigeration might properly be somewhat increased over the actual cost of the ice. We think that the Railroad Company, in consideration of the fact that the Armour Company now renders a part of the service which was formerly rendered by the Railroad Company as a part of the rate, ought to contribute to the payment of a portion of these refrigeration charges, unless the car mileage already paid is more than a fair compensation for the use of the refrigerator car; and we think that the Armour Car Lines Company itself should exact less for this service, in many instances certainly, than it now does.

It seems proper to state that two phases of this matter were called to the attention of the Commission upon the hearing which have not been referred to in this report.

First: It appears that the Armour Car Lines Company—and that is Armour & Company—already has a practical monopoly

of the fruit carrying business under refrigeration from Michigan. We know from former investigations that this is also true in some other sections of the country; and this monopoly may finally become general. All this is a matter of no concern to the public so long as the service is good and the charge reasonable; but the establishment of a general monopoly might result in poor service, just as it has in this section already resulted in exorbitant charges. For this reason it is urged that the Railway Companies ought not to be permitted to make exclusive contracts with private car lines like those under consideration, but should be compelled to provide their own equipment. The facts before us call for no expression of opinion on that subject, and none is attempted.

Undoubtedly the public interest would be best conserved if the carrier published and maintained the charge for refrigeration either by the carload or by the hundred pounds as it does its rates of freight.

Second: It was said Armour & Company are extensive dealers in fruits and vegetables, and that the control of the cars in which and of the charges at which these articles must be transported might work to the serious disadvantage of competitors. The testimony in this case shows that Armour & Company buy apples but not other fruits in Michigan, and there is nothing to indicate any prejudice to any one growing out of that fact. This record calls, therefore, for no discussion of that subject, and the matter is referred to here merely to make plain that no opinion has been expressed upon that phase of the private car question, which may come to be one of vital importance.

10 I. C. C. REP.

No. 625.

THE CINCINNATI CHAMBER OF COMMERCE AND
MERCHANTS' EXCHANGE

v.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE CINCINNATI & MUSKINGUM VALLEY RAILROAD COMPANY; THE CINCINNATI & WESTWOOD RAILROAD COMPANY; THE CINCINNATI, GEORGETOWN & PORTSMOUTH RAILROAD COMPANY; THE CINCINNATI, HAMILTON & DAYTON RAILWAY COMPANY; THE CINCINNATI, LEBANON & NORTHERN RAILWAY COMPANY; THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY; THE CINCINNATI NORTHERN RAILROAD COMPANY; THE CINCINNATI NORTHWESTERN RAILWAY COMPANY; THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE ERIE RAILROAD COMPANY; THE LOUISVILLE & NASHVILLE RAILROAD COMPANY; THE NORFOLK & WESTERN RAILWAY COMPANY; AND THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

Decided October 4, 1904.

1. The Commission is authorized by the Act to regulate commerce, after investigation, to order carriers to cease and desist from subjecting any particular person, locality or description of traffic to undue or unreasonable prejudice or disadvantage in any respect whatsoever, and its jurisdiction extends to a case of alleged unlawful prejudice and disadvantage to shippers of outbound package freight through enforcement

10 I. C. C. REP.

by carriers of a regulation providing for the earlier closing of depots used for the reception of such freight.

2. The defendants more largely engaged in carrying outbound package freight from Cincinnati are unable, with their present depot facilities and times for the departure of evening trains, to clear their platforms daily of that class of traffic without closing the receiving depots for such freight at 4:30 P. M. A closing rule which prevents congestion of freight in depots is as much to the advantage of the shipper as a later hour would be in enabling the shipper to place his freight in the depot, and the carriers are doing the best they can in their present circumstances. The large and growing volume of outbound package freight from Cincinnati indicates the necessity of strenuous efforts by the carriers to remove any existing hardship to shippers through inability to compete under the early closing rule on even terms with shippers in other distributing cities. *Held*, That the existing disadvantage to Cincinnati, under present circumstances, is not unreasonable or undue, but it may become so if continued indefinitely, and that dismissal of the complaint is without prejudice to any further necessary proceeding.

B. W. Campbell for complainant.

George Hoadley, Jr., for L. & N. R. R. Co., B. & O. S. W. R. Co., and C., N. O. & T. P. Ry. Co.

S. O. Bayless for C., C., C. & St. L. Ry. Co. and Cincinnati Northern R. R. Co.

John Galvin for Chesapeake & Ohio Ry. Co.

Lawrence Maxwell, Jr., for C., H. & D. Ry. Co., Cincinnati, Lebanon & Northern Ry. Co., P., C., C. & St. L. Ry. Co., Erie R. R. Co., and Cincinnati & Muskingum Valley R. R. Co.

REPORT AND OPINION OF THE COMMISSION.

KNAPP, Chairman:

The complaint alleges undue and unreasonable prejudice and disadvantage to shippers at Cincinnati, Ohio, by a regulation of the defendants which changed the hour of closing their freight depots in that city on each week day for the reception of outgoing package freight from 5 to 4:30 o'clock P. M. daily, except Saturday, and also changed the closing hour on Saturday from 1 to 12:30 P. M.

The complainant is an association of merchants, manufacturers and shippers doing business in Cincinnati. The case in-
10 I. C. C. REP.

volves only outgoing package freight in less than carload lots. Five or six years ago the defendants' closing hour in Cincinnati for outgoing packages was 5:30 P. M. Subsequently and up to November 1, 1901, the hour for closing was 5 o'clock P. M. daily, except on Saturday, when the depots were closed at 1 o'clock P. M. Since that date the closing hour from Monday to Friday, inclusive, has been 4:30 P. M., and on Saturday 12:30 P. M. The opening hour has been and still is 7 o'clock A. M. The action of the defendants reduced the usual time for receiving this class of freight by one-half hour each day. The shippers protested against the change but the carriers declined to return to the old arrangement. The hours for delivering inbound freight are from 7 A. M. to 6 P. M., but the closing hour is frequently extended to 8 P. M. and in case of congestion the delivery would be continued throughout the night.

The closing hours for the reception of outgoing package freight in other large cities in the Middle West were, at the time the complaint was filed, as follows:

Chicago,	5:30	P. M.,	Monday	to	Friday	4:00	P. M.,	Sat.
Indianapolis,	5:00	"	"	"	"	4:00	"	"
Milwaukee,	5:00	"	"	"	"	4:00	"	"
Louisville,	5:00	"	"	"	"	4:00	"	"
Columbus,	5:00	"	"	"	"	3:00	"	"
Toledo,	5:00	"	"	"	"	3:00	"	"
Detroit,	5:30	"	daily					
Pittsburg,	5:00	"	"					
Cleveland,	5:00	"	"					

The testimony does not show definitely the precise hours for closing at East St. Louis and St. Louis, but it is understood from the record that the depot at East St. Louis remained open as late as 5:30, if not as late as 6 P. M., and at St. Louis as late as 5 o'clock, possibly until 5:30 P. M. At some of these places above mentioned the depots close on Saturday during the summer months at hours ranging from 12:00 M. to 2:00 P. M.

At Indianapolis the hours have since been made 4:30 P. M., Monday to Friday and 12:30 P. M., Saturday, the same as those now prevailing in Cincinnati, and at St. Louis at 4:30 P. M., Monday to Friday, and on Saturday at 4:00 P. M., except in the summer when the Saturday closing hour is 12:00 M. At the time of the hearing the railroad companies serving Columbus,

Cleveland and Louisville were considering the adoption of the Cincinnati hours at those places. At Dayton, O., the Cincinnati hours are in force. Cincinnati competes most largely for this package freight with Chicago, St. Louis, Indianapolis, Columbus, Cleveland, Pittsburg and Louisville.

The trains carrying this outbound freight leave Cincinnati from 5:30 to 8 or 9 o'clock P. M. and the cars must be closed from fifteen to thirty minutes before the time of departure. When the closing hour was 5 o'clock the carriers were often unable to clear the outbound platforms of all goods received the same day. Under the present arrangement the defendants are able, twenty-nine days out of thirty, to load out all package freight the day it is received. Inbound freight may lie in the depots as long as 48 hours and by removing the outbound freight the carrier is able to use the outbound house for inbound freight and deliver this inbound freight at earlier hours of the day. The earlier closing hours benefit the depot employees. Trains leaving at 6:30 P. M. or later could be loaded with freight received at or before 5 P. M. when the freight offerings are in such volume that they can be expeditiously loaded. The volume of package shipments from Cincinnati, however, is very large and constantly increasing. On one road in a single month the traffic increased 18 per cent over that for the same month in the preceding year. On another the business has become 30 per cent greater during the past few years. One of the more important lines loads daily over its platform outgoing package freight aggregating about one and three-quarter million pounds and requiring 135 cars for transportation. This indicates the immense and constantly increasing pressure upon the facilities of the railroads in Cincinnati for the handling of outbound shipments in less than carloads. To clear daily the platforms of this great volume of freight consisting of a large number of separate shipments, all of which must be checked and way-billed, the carriers find it necessary to adopt a closing hour which will enable performance of the necessary labor prior to the departure of the evening trains, and they fixed the present hours in good faith to accomplish that purpose. The waybills cannot be completed in time to go by the freight trains and they are forwarded

10 I. C. C. REP.

by a passenger train which overtakes the freight during the night and following morning. With the facilities now provided the evidence warrants the finding that taking the roads in Cincinnati as a whole the present regulation is necessary to prevent congestion of the depots used for this branch of the traffic consigned from Cincinnati.

The present depot facilities for handling freight in Cincinnati by the lines receiving the greater portion of such traffic are apparently inadequate. At the time of the hearing the Baltimore & Ohio Southwestern was erecting additional freight houses at a cost of \$150,000, and the Pennsylvania was expending \$20,000 for freight houses and \$150,000 for an additional yard.

The defendants by closing their depots one-half hour earlier each day interfered seriously with the business of the Cincinnati merchants. Such action affects that part of the day in which the rush of business is greatest and prevents the filling of numerous orders received by the later afternoon mails, causing a delay of 24 hours. There was practically no complaint of delay when the closing hour was 5 o'clock. The present regulation also adds to the expense of some merchants who do their own teaming by requiring an additional team and driver, others, to retain the business of customers, send shipments on later orders by express at additional cost, and in various ways the rule operates to embarrass the transaction of business upon orders for small shipments demanding immediate despatch. On the other hand it has been the custom of some small shippers in Cincinnati to hold back their freight until late in the evening.

With strong competition at Louisville, Chicago, St. Louis, Indianapolis, Columbus, Toledo, Pittsburg and other cities inability to promptly fill orders for immediate shipment at Cincinnati because of the earlier depot closing hour, while such orders can be and are filled and forwarded in other cities under later closing hours in force at those points, results in loss of some of the quick-order business and may affect also the regular trade between the Cincinnati merchant and the country customer; and as several of the defendants serve Chicago and other points above named a further result is some preference and advantage to the competing cities.

This injurious effect upon the Cincinnati business would be obviated if the closing hours at Cincinnati and the other competing localities were made substantially the same. If the depots in all places were closed at 4:30 P. M. Cincinnati could not complain, or if 5 o'clock should again be made the time of closing at Cincinnati, with the closing hours at the other places remaining as they now are, there is nothing to indicate that Cincinnati would complain. On the other hand, various conditions may affect the provision of railroad facilities at different points for the reception of freight, and the times for the departure of evening trains are controlled by conditions which have unequal force at different points. Shippers generally at competing cities must and do adjust the conduct of their business to the differing rules and regulations which carriers find necessary to apply at different points in the reception and delivery of freight, and unless the carrier in providing transportation or depot facilities, including the hour for closing, is clearly acting in disregard of the rights of shippers, the resulting inconvenience or embarrassment of shippers and even some additional expense in the delivery of freight to the carrier are not matters which warrant a finding that the prejudice is *undue*, or the disadvantage *unreasonable*.

CONCLUSIONS.

The Commission is authorized by the Act to regulate commerce, after investigation, to order carriers to cease and desist from subjecting any particular person, locality or description of traffic to undue or unreasonable prejudice or disadvantage in any respect whatsoever, and its jurisdiction extends to a case of alleged unlawful prejudice and disadvantage to shippers of outbound package freight through enforcement by carriers of a regulation providing for the earlier closing of depots used for the reception of such freight.

The defendants more largely engaged in carrying the great and increasing volume of outbound package freight consigned from Cincinnati, are unable, with the present times for the departure of evening trains and their depot facilities in that city, to clear their platforms daily of that class of traffic without clos-

10 I. C. C. REP.

ing the receiving depots for such freight at 4:30 P. M., and it is obvious that a rule for early closing which prevents congestion of freight in the receiving depot is as much to the advantage of the shipper as a later hour would be in enabling the shipper to place his freight in the depot. The carriers are apparently doing the best they can in their present circumstances, and that condition, it seems to us, must control the disposition of this case.

We are constrained to think, however, that a less than carload outbound business from Cincinnati which requires for transportation upon only one of the defendant roads a daily equipment of 135 cars is sufficiently large to call for strenuous efforts by the defendants to not merely clear the outbound platforms each day, but also to prevent any resulting hardship to shippers through their inability, under the early closing rule, to compete on even terms with shippers in other distributing cities for the business involved in afternoon orders for freight to be delivered at destination the following day. Such hardship would be removed by the fixing of corresponding closing hours at the cities which principally compete with Cincinnati for this business, or by the defendant carriers increasing their facilities in Cincinnati for receiving and forwarding this freight and restoring the 5 o'clock closing hour in that city.

While under the circumstances shown in this case we cannot find the existing disadvantage to Cincinnati shippers unreasonable or undue, it may become so if the present condition is continued indefinitely, and although the present complaint must be dismissed it will be without prejudice to any further necessary proceeding.

10 I. C. C. REP.

No. 735.

IN THE MATTER OF DIVISIONS OF JOINT RATES
AND OTHER ALLOWANCES TO TERMINAL
RAILROADS.

Decided November 3, 1904.

1. While there may be great objections to allowing shippers to build and operate railroads over which their traffic moves, such action is not prohibited by the Act to regulate commerce; and the mere fact that the property of a common carrier is owned by the largest individual shipper over it, or that it was originally constructed for the purpose of doing the work of that shipper, furnishes no reason why it cannot make joint rates and agree upon joint divisions with other railroads.
2. The Act to regulate commerce prohibits a difference in charges as between shippers "by any special rate, rebate, drawback or other device" and the granting of any undue preference to any individual or species of traffic "in any respect whatsoever," and the Elkins amendment, requiring the publication of tariffs in all cases, prohibits, under severe penalty, any practice on the part of the carrier "whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs . . . or whereby any other advantage is given or discrimination is practised." The manifest intention of the Act to regulate commerce, especially as expressed in the Elkins amendment, is to strike through all pretense, all ingenious device, to the substance of the transaction itself; and where excessive divisions of rates are granted by a carrier to another carrier owned and controlled by a shipper, for the purpose of obtaining the traffic of that shipper, they benefit the shipper and operate as a rebate or other device to cut the tariff charge in violation of the law.
3. The International Harvester Co. owns the capital stock of the Illinois Northern R. Co. and a controlling interest in the Chicago, West Pullman & Southern R. Co., operating as terminal connecting roads in and about the City of Chicago between the plant of the Harvester Co. and various other industries and connecting roads leading to the Missouri River and other sections of the country. Until recently, the charge

received for services by these terminal roads was a switching charge amounting to from \$1.00 to \$3.50 per car for the Illinois Northern and \$3.00 per car for the Chicago, West Pullman & Southern. These lines now receive in many instances a division of the rate, which on lines reaching the Missouri River is 20 per cent, with the Missouri River division as the maximum. This amounts, on farm machinery, to \$12.00 per car of 20,000 pounds as against the former maximum of \$3.50 per car. A charge of \$3.50 per car by the Illinois Northern and of \$3.00 per car by the Chicago, West Pullman & Southern would be reasonable for these switching services, and charges for such services in excess of those sums amount to unlawful preference in favor of the International Harvester Co.

4. The Chicago, Lake Shore & Eastern R. Co., owned by the United States Steel Corporation, is a terminal road operated between the Illinois Steel Co.'s works, near Chicago, and connecting with roads leading East, West and South. It receives a division of 10 per cent of the rate to the seaboard; 15 per cent to Buffalo and Pittsburg, and 20 per cent to the Missouri River and beyond, and in some cases obtains special divisions. These divisions are found to be grossly excessive for the service rendered and to afford unlawful preference to the United States Steel Corporation which owns and controls the Illinois Steel Company.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, Commissioner:

In consequence of information that preferences were being granted to certain industries, by means of excessive divisions allowed terminal lines owned and operated by those industries, an investigation was undertaken into that subject in the spring of 1904. The scope of that investigation embraces such operations in various localities. The first hearing was held in Chicago in May, 1904, and had reference merely to conditions obtaining in and around that city. Subsequent hearings will have further reference to other localities, but inasmuch as conditions found to exist there are, without doubt, fairly typical of those prevailing elsewhere, it seems proper at this time to make some report on the facts developed, and to state our opinion touching those facts.

The International Harvester Company was organized in 1902, apparently for the purpose of consolidating under one management several concerns previously engaged in the manufacture of farm machinery. It took over and is now operating the Deer-

ing Harvester Company, the McCormick Harvester Company, the Plano Company, the South Chicago Furnace Company, and perhaps others. In this discussion the McCormick division of the International Harvester Company will be known as the McCormick Company, and the Plano division as the Plano Company. The International Harvester Company now has the same interest in the Illinois Northern Railroad and the Chicago, West Pullman & Southern Railroad which the McCormick Company and the Plano Company formerly had, respectively.

The Illinois Northern Railroad Company was incorporated in 1901, under the laws of the State of Illinois, with a capital stock of \$500,000. While this capital stock did originally, and perhaps does to-day, stand in the names of various individuals, it was entirely paid for by cash furnished by the McCormick Company, was entirely owned by that Company down to the time of its absorption by the International Harvester Company, and is to-day the property of the latter company.

What may be called the main line of the Illinois Northern Railroad extends from the works of the McCormick Company at 26th Street, in the City of Chicago, to 49th Street, a distance, as we understand the testimony, of approximately five miles. It also has trackage rights over the Chicago Union Transfer Railway from 49th Street to the Stickney Yard, so-called, at 75th Street. It owns eleven locomotives and a few flat cars, and employs in the operation of its property an entire force of from eighty-five to one hundred men. It maintains a freight station, at which a force of from eight to eleven men are employed, through which it handles less than carload traffic for the general public, although its principal business is the handling of carloads, as hereinafter set forth. It way-bills both carload and less than carload freight to destination.

The McCormick Company at the time of the organization of this railroad company was operating an extensive plant at 26th Street. As a part of this plant it had constructed and was maintaining within the limits of its own grounds some seventeen miles of railroad track. It used two steam locomotives and several electric motors upon these tracks in the various operations connected with its business.

Three railroads made direct connection with these tracks at 26th Street—namely, the Santa Fe System, the Burlington System, and the Chicago Junction Railway, one of the switching lines in Chicago. These three railroads received freight from and delivered freight to the McCormick Company at 26th Street, and in receiving and delivering such freight performed without charge over the switch tracks of that company certain switching services, the extent of which did not plainly appear. This arrangement involving as it did the operation of the engines of three distinct companies besides its own locomotives upon these switching tracks, was found unsatisfactory and inefficient by the McCormick Company, and the primary purpose in organizing the Illinois Northern Company seems to have been to take over these tracks and thereby maintain and operate them under a single management.

The first tracks acquired by that Railroad Company were these private tracks of the McCormick Company. The contract under which these tracks were acquired and are operated was put in evidence by one of the witnesses having custody of the same, but has not been furnished the Commission. It would appear from the testimony that at the present time the Illinois Northern Company owns, maintains, and operates these tracks without any charge whatever to the McCormick Company, except in some cases where a car is moved from one portion of the yard to another, when \$1.00 per car is collected for that service. No witness was able to state what the expense of maintaining and operating these switch tracks had been to the McCormick Company before they were acquired by the Illinois Northern Railroad Company. At the present time it is entirely relieved of all expense in that connection, save what arises from the payment of the \$1.00 per car, as above the amount of which did not appear.

The Santa Fe connection with the McCormick switch tracks was over a switch track running from 49th Street to 26th Street. It appeared that formerly this track had been owned by the Grand Trunk Railway Company and leased to the Santa Fe upon condition that deliveries to or from the Grand Trunk Railway from industries along this track should be made by the

Santa Fe for \$1.00 per car. The Santa Fe now leased this track to the Illinois Northern upon condition, among others, that the Illinois Northern should assume the obligation of the Santa Fe to the Grand Trunk in the making of deliveries, and should also make delivery on account of the Santa Fe itself at the same charge of \$1.00 per car. This switch track which is leased from the Santa Fe is now its main line from 26th Street to 49th Street, and in addition to this it has trackage rights over the Chicago Union Transfer Railway from 49th Street to 75th Street. By virtue of its own line and its trackage rights it makes connection with many of the most important railway systems entering the City of Chicago.

Numerous industries are located along the line of the Illinois Northern between 49th and 26th Streets which are dependent upon this line for access to the various railroads by which their shipments are sent and received. These industries are served by the Illinois Northern both in handling carload and less than carload freight in and out. It appears that in case of all such industries except the McCormick plant, the switch tracks within the private limits of each industry are owned by that industry itself. These various plants are allowed to route their traffic, the Illinois Northern making whatever delivery is indicated by them, and are charged simply the Chicago rate, paying nothing, as we understand the testimony, in the nature of a switching charge, and receiving no part of the charges made by the Illinois Northern Company. It was said that something over two hundred different industries were served by this railroad as above.

— The Chicago, West Pullman & Southern Railroad is located in West Pullman, a part of the City of Chicago. It is about four miles in length, extending from the works of the Plano Company to a connection with several important railway systems entering the City of Chicago, among which are the Wisconsin Central and the Rock Island. It was originally constructed by a real estate syndicate for the purpose of affording railway accommodations to industries which might locate upon the land of that syndicate, having been incorporated under the laws of Illinois in 1900, and built soon afterwards. At first it was not well maintained or operated, and when the Plano Com-

10 I. C. C. REP.

pany located there in 1903 it was thought necessary to devise some means for the improvement of the service obtainable on this road. Some other industries had been established along its line, and the capital stock of the Company, which was \$50,000 in all, was now bought up by these different industries. The greater part of the stock seems to have been acquired by the Plano Company, but a portion of it is owned by some of the other industrial companies.

This road at the present time has an equipment of one locomotive and a few flat cars. It employs only about twenty men. It maintains a freight station at which it handles for the general public less than carload freight, but its principal business is in switching carload freight from its connections with various railroads to industries located along its line, and vice versa. It owns, maintains, and operates the tracks within the private grounds of the Plano Company without expense to that Company except that for certain movements a charge per car is perhaps made. It does not appear whether it performs a similar service for any of the other industries along its line, nor does it appear whether any of those industries are of such a character as to require the performance of such service.

There seems to be in and around the City of Chicago a district more or less accurately defined, which is known as the "switching limits." Within this territory deliveries are made and cars moved between various points for a switching charge, and this applies not only to belt lines and switching lines proper, but to the similar operations of other railroads within those limits. If the Rock Island System, for example, were to move a car from some industry located upon its line to the tracks of the Burlington System, it would receive for that service, not a division of the through rates, but a switching charge measured usually by the car. These switching charges vary from \$1.00 per car as a minimum to a maximum of \$10.25 per car, the latter charge being made by the Chicago Terminal Transfer Company for the local haul between the extremities of its line, the exact distance not appearing. Instances were given where a charge of \$7.80 per car was imposed for a distance of forty miles. The ordinary charge for a movement of from two to ten miles seems

10 I. C. C. REP.

to be in the vicinity of \$3.00 per car, although this depends upon a variety of conditions and is governed by no rule of uniform application.

Until recently the Illinois Northern Railroad and the Chicago, West Pullman & Southern Railroad have both performed the service rendered by them upon this same basis. The maximum distance over which cars are handled by the latter Company is, as already seen, not in excess of four miles, and the charge of that Company was, until recently, \$3.00 per car. The road has handled from ten to twelve thousand carloads per year, in addition to some less than carload business, and upon a \$3.00 basis has been able to pay its operating expenses and show a net profit of about \$4,000 per year. It was said in testimony that since its organization it had declared three dividends of ten per cent each upon its capital stock. We think and find that \$3.00 per car for the service rendered by this Company is enough, and that anything above that is clearly exorbitant.

The charges imposed by the Illinois Northern Company have varied from \$1.00 per car, the price named in its contract with the Santa Fe, to a maximum of \$3.50 per car. The operations of this Company have uniformly shown a deficit. A statement filed upon the hearing covering the period between July 1, 1903, and February 29, 1904, showed a deficit of \$12,000. It must be remembered, however, that this Company was organized for the purpose of acquiring and operating the seventeen miles of track within the private grounds of the McCormick Company, that these tracks form much the larger part of its total mileage, and that the expense of their maintenance and operation must be very considerable. There is nothing to show what the financial result from its operations would be if the McCormick Company paid the same sum for this service which it had previously expended when the tracks were owned and operated by it. Judging from the experience of the Chicago, West Pullman & Southern and from the charges which are ordinarily imposed for the performance of similar service under similar conditions in the vicinity, we think and find that \$3.50 per car is a reasonable charge for the performance of these switching services, and that anything above that is unreasonable.

10 I. C. C. REP.

At the present time both of these railroads receive in many instances, not a switching charge, but a division of the through rate. Over nearly all lines reaching the Missouri River, these divisions apply, and are twenty per cent of the rate, with the Missouri River as a maximum. The rate on the farm machinery manufactured by the International Harvester Company to the Missouri River is 30 cents per hundred pounds, with a minimum of 20,000 pounds or at least \$60 per car. The proportion of the Illinois Northern upon this traffic when intended for the Missouri River or beyond would, therefore, be \$12.00 per car, as against a former maximum charge of \$3.50 per car. When the destination is such that the rate is less than 30 cents per hundred pounds, the division would be correspondingly less, and, upon the other hand, if more than the minimum weight is loaded, the division might be greater. These divisions are allowed upon all traffic, both in and out, over the Illinois Northern and from other industries located upon its line, as well as the McCormick Company, although it appears that in some cases the movement is still on a switching basis, and it might well follow that with other commodities where the loading is heavy the division received by the Illinois Northern would be greater than \$12.00 per car. Whatever has been said with respect to the Illinois Northern applies equally to the Chicago, West Pullman & Southern.

The International Harvester Company owns these two railroads. Its officials are the officials of those roads in most instances. It absolutely controls the operations of the roads, as well as the routing of its own traffic. A large portion of its traffic is shipped to competitive points; that is to say, to points which may be reached from Chicago over more than one line of railway, and usually by several. While there was some little attempt at evasion, the testimony plainly shows that under ordinary circumstances the competitive traffic of the International Harvester Company and of these two railroads would not be given to a line which did not allow these divisions so long as any line was available which did allow them. In other words, if one line granted the division other lines must follow or they could not obtain the business.

It appeared that these divisions were first granted to the Chicago, West Pullman & Southern by the Wisconsin Central Railway in September, 1903. The Freight Traffic Manager of that Company testified that they were granted by him as a matter of justice; that it was a universal rule observed between connecting railroads to allow the originating line a division of the through rate, which was never less than twenty-five per cent; and that since he knew of no reason why this originating line should not have the benefit of that rule he had granted the twenty per cent division in question.

We are unable to accept this statement as representing the exact situation. There is in our opinion no analogy whatever between the Illinois Northern Railroad and the Chicago, West Pullman & Southern Railroad, and the connecting line which originates traffic under ordinary conditions. While these railroads may be railroads within the technical meaning of that term, while they may even fall within the definition of the Act to regulate commerce, they have none of the incidents of a railroad proper. They were constructed for the sole purpose of moving cars from various industries to railroads which may be termed railroads proper. That service is essentially a switching service. It has been performed for years by these railroads upon that basis. It is performed by most other railroads in this vicinity under similar conditions upon that basis. If the Chicago, West Pullman & Southern delivers a car to the Rock Island for delivery to the Burlington System, the Rock Island receives for that service a switching charge of \$3.00 per car, although it transports the car some ten miles, as against a haul of three or four miles by the West Pullman road. Why should that road be allowed a division of \$12.00 per car, leaving \$9.00 for its service after payment to the Rock Island? The only difference which exists between the case of these two railroads and the case of other switching roads in Chicago arises from the circumstance that the International Harvester Company is the owner of these roads. When the Wisconsin Central substituted the division for the switching charge, it increased the compensation paid by it to the Chicago, West Pullman & Southern from two to three times. We find nothing in the location of the West Pullman .

10 I. C. C. REP.

which calls for this; we find nothing in the financial condition of that road which required, nor in the financial condition of the Wisconsin Central which justified, any such gratuity. We do not for a moment believe that it was a gratuity. We think and find that this act sprang, not from motives of generosity or the dictates of justice, but from the desire and expectation to thereby obtain from the International Harvester Company traffic not otherwise obtainable. Corresponding divisions were subsequently granted by other competitive lines, because otherwise competitive business could not be obtained. We think and find that these divisions are not regarded by the carriers which grant them as a legitimate charge for the performance of this service, and that they do, in fact, in so far as they exceed a reasonable compensation for the performance of the service, amount to a direct preference in favor of the International Harvester Company.

The Elgin, Joliet & Eastern Railway and the Chicago, Lake Shore & Eastern Railway were considered together for the reason that the management of these two properties is identical. In fact, as related to this investigation, there seems to be no analogy between the railroads themselves. The Elgin, Joliet & Eastern is properly a belt road extending entirely around the City of Chicago from Waukegan upon the north to Porter, Indiana, upon the east. It has 205 miles of main track, owns 58 locomotives and nearly 3,000 cars. Its capital stock is \$6,000,000, and its bonds \$8,500,000. It is not owned by, so far as it appears, nor does it especially serve, any particular industry. It is not apparently involved in this proceeding, unless it may be by reason of its relation to the Chicago, Lake Shore & Eastern and its owners. Whatever the fact may be, nothing of that sort appears upon this record, and it is unnecessary to state the facts with reference to that property.

The Chicago, Lake Shore & Eastern Railway is a creature of the Illinois Steel Company. Its stock was entirely owned by that Company previous to the absorption of the Illinois Steel Company by the United States Steel Corporation, and it is now exclusively owned by the latter Company. The present Chicago, Lake Shore & Eastern Company seems to be the result of a con-

solidation of previous companies, and the properties operated by it are partly owned and partly leased. Neither its previous history nor its present status in this respect very clearly appears, nor do they seem material. Its connection with the Illinois Steel Company is best understood by considering the extent and location of its various tracks, which are as follows: At South Chicago, 62 miles; at Joliet, 18 miles; at the Union Works of the Illinois Steel Company, 10 miles; at the North Works of that Company, 4 miles, and at Bay View, a suburb of Milwaukee, 18 miles. All the foregoing tracks are within the private limits of the plants of the Illinois Steel Company at these various points. In addition to these private switch tracks it has a main track extending from South Chicago to Indiana Harbor, a distance of six or seven miles, which connects with various railroad systems. It also has short lines extending from its various plants to a connection with the Elgin, Joliet & Eastern at various points. It leases certain trackage rights from the latter Company, by which it obtains a connection with substantially all the railroads entering Chicago, and between all its various plants, except the one at Bay View, between which and its other tracks there is, apparently, no connection over its own iron. It has 1,213 employes, 4,539 cars, and 70 locomotives. It will be seen, therefore, that a very large part, probably the largest part of the operations of this Company, consists in maintaining and operating the tracks within the various plants of the Illinois Steel Company.

The testimony indicates that the Chicago, Lake Shore & Eastern Railway has trackage rights over other railroads besides the Elgin, Joliet & Eastern. In the exercise of these trackage rights it handles large quantities of traffic between the several plants of the Illinois Steel Company, and also from the points of origin to those plants; as, for example, coal from the mine to the furnace. It was said that the quantity of traffic handled by this Company from point of origin to destination was very large. In so far as this traffic is interstate, the Railway Company publishes a tariff, and the Illinois Steel Company pays to the Railway Company the tariff rate so filed. For switching cars to and from the various plants of the Illinois Steel Company which

10 I. C. C. REP.

arrive or depart over connecting lines, the Railway Company seems to receive in nearly all cases a division of the through rate. We have seen that the railroads of the International Harvester Company had no divisions with eastern lines; but the railway of the Illinois Steel Company seems to be more favored in this respect. Its divisions with all eastern connections are ten per cent on traffic to the seaboard, fifteen per cent when the destination is Buffalo and Pittsburgh, and twenty per cent on business to the Missouri River and beyond. It does not clearly appear what division it receives upon traffic destined to the south. It further appears that in some cases it enjoys special divisions. The testimony shows, for example, that the Baltimore & Ohio has in the past, and does now, accord to the Chicago, Lake Shore & Eastern a division of seventy cents per ton on coke from the Connellsville region.

These divisions are plainly excessive. The rate from Chicago to New York on iron articles is $27\frac{1}{2}$ cents per hundred pounds, with a minimum of 30,000 pounds. Assuming that a car contained only the minimum loading, the aggregate freight would be \$82.50 per car, of which the Lake Shore & Eastern would receive \$8.25 for moving the car to a connection with the eastern line at Indiana Harbor. Commodities taking this rate usually load considerably above 30,000 pounds, so that the amount actually received per car would be considerably more than that above given. Other destinations would show on the average a division fully equal to this. Coke from the Connellsville region moves in train loads, in cars especially designed for that purpose. While the testimony in this case does not show either the car loading or the number of cars to the train, it is safe to say that the carload would equal 30 tons at least, and that the train-load would be forty cars. The Chicago, Lake Shore & Eastern would receive \$840 for hauling this train-load from Indiana Harbor to its destination.

While it can be confidently affirmed that these divisions are grossly excessive, the exact amount of that excess cannot be determined with the same confidence that it could be in case of the Illinois Northern and the Chicago, West Pullman & Southern Railroads, for the reason that the service rendered by the

Lake Shore & Eastern differs greatly in different cases, according as the movement may be to one or the other of its various plants. Its principal plant is evidently at South Chicago, and the distance which it ordinarily moves a car to or from that plant would not exceed six or seven miles. For the rendition of this service, under the conditions prevailing, \$3.00 per car would be ample compensation. The cost of moving a train-load of coke from Indiana Harbor to South Chicago and moving the empty cars back again, for which the Lake Shore & Eastern receives \$840, would not probably exceed \$40. If, however, the movement is to Joliet, a distance of thirty miles, or some of its other plants, in case of which the distance does not appear, it is evident that the cost of the service would be greater.

That these charges are extravagant is at least indicated by the financial report which this Company makes to the Interstate Commerce Commission, although that report may be misleading, and we do not base our conclusions upon it. The capital stock of the Chicago, Lake Shore & Eastern is \$650,000, and its bonded indebtedness is \$3,200,000, upon which the interest aggregates \$168,700 annually. The Company earned from operations during the year ending June 30, 1904, \$3,134,550, and its operating expenses were \$1,698,356, leaving the income from operation \$1,436,194. Its taxes for that year were \$19,233, and its rentals paid \$221,780. Apparently, therefore, after deducting its fixed charges and its taxes, there would remain as a net result a sum equal to more than one hundred and fifty per cent upon its capital stock. No dividend was paid. The Company expended \$195,000 in permanent improvements. What became of the balance the report does not show.

It will be noticed that out of these operating expenses the Lake Shore & Eastern maintains, without expense to the Illinois Steel Company, the miles of track within its private yards above set forth. When it is remembered that the South Chicago division of the International Harvester Company has within the limits of its plant at South Chicago six or seven miles of track, upon which it uses three locomotives, all of which it constructs and maintains without assistance from the railways, it will be readily understood that the construction and maintenance of all
10 I. C. C. REP.

these private tracks of the United States Steel Corporation in and about Chicago must cost a large sum annually. Indeed, it is fairly inferable that the greater part of the operating expenses of this Company are incurred in that manner. It should, perhaps, be said in this connection that under certain circumstances the Illinois Steel Company pays the Lake Shore & Eastern Railway Company a certain charge for the movement of cars within the private limits of these plants.

We are of the opinion in this case, as in the case of the Illinois Northern and the Chicago, West Pullman & Southern Railroads, that the only service for which the railways transporting the traffic of the Illinois Steel Company to and from Chicago can properly charge is the switching service to and from the plants of that Company; that the divisions in question are much in excess of any fair charge for that service; that they are intended and understood to be in excess of what would be a reasonable charge; that they are, in fact, paid to secure the traffic of the Illinois Steel Company; and that they do, in fact, amount to a preference in favor of that Company by whatever amount they exceed a fair compensation for the service rendered. What that amount is cannot be determined upon this record; it is clear that it annually aggregates what to the ordinary apprehension is an enormous sum.

Some testimony was taken with reference to certain other enterprises of this character, most of which are still in a somewhat embryonic state. Its chief value is to illustrate the tendency to seek preferences by this means, and it does not seem necessary to go into details here.

CONCLUSIONS.

The International Harvester Company owns the Illinois Northern Railroad. Whatever profit accrues to that railroad inures to the benefit of the Harvester Company, its owner, alone. When any one of these lines leading from Chicago to the Missouri River pays to the Illinois Northern Railroad Company \$12.00 for the performance of a switching service, which is worth reasonably but \$3.00, it *gives* to the International Harvester Company, the shipper of that carload of merchandise,

10 I. C. C. REP.

\$9.00. If these divisions, which have been in effect since January, 1904, are legal, there is no practical limit to the extent to which the lines granting them may prefer the International Harvester Company over other shippers. It is, therefore, a matter of great consequence to determine how far such practices are lawful. That preferences of this kind will be granted as a matter of fact, if they can be as a matter of law, abundantly appears from this investigation.

It must be assumed that the Illinois Northern Railroad is a common carrier within the provisions of the first section of the Act to regulate commerce. It is incorporated as a railroad company under the laws of Illinois. It actually owns and operates a line of railroad. It maintains a freight station, at which it receives and delivers for the general public considerable quantities of less than carload freight. Its main business is the moving of loaded cars to and from various industries along its line, and in this capacity it serves more than two hundred plants, besides that of the International Harvester Company. Manifestly there is no reason in law why this railroad may not make joint rates, file joint tariffs, and agree upon joint divisions as other railroads do. We are not called upon to decide what the situation might be if this road were a private carrier maintaining switch tracks and switching cars to and from the McCormick works exclusively.

The mere fact that this road is to-day entirely owned by the largest individual shipper over it, or that it was originally organized and built for the purpose of doing the work of that shipper, is not, in our opinion, controlling against the legality of the transaction before us. While there may be grave objections to allowing shippers to build and operate railroads over which their traffic moves, the Interstate Commerce Act contains no prohibition of that kind. This was so ruled by us in *Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co.* 10 I. C. C. Rep. 193. We also held, in *Re Allowances to Elevators by the Union P. R. Co.* 10 I. C. C. Rep. 309, that the Union Pacific Company might pay an elevator company for transferring grain from its cars to the cars of its connections at Council Bluffs, so long as the transaction was in good faith, even though the greater

10 I. C. C. REP.

part of the grain so transferred belonged to the Elevator Company receiving the compensation.

The vice in the present case is to be found in the thing done, not in the manner of doing it. A cardinal purpose of the Act to regulate commerce is to prohibit all preference between shippers, and the framers of that Act and its amendments have evidently attempted to make the language sufficiently comprehensive to render every sort of preference, by whatever means attempted, unlawful. The second section of the original Act provides that no greater compensation shall be collected of one shipper than of another "by any special rate, rebate, drawback, or other device." The third section provides that it shall be unlawful for a common carrier subject to the Act to grant any undue preference to any individual or any species of traffic "in any respect whatsoever." The amendment of the Act, approved February 19, 1903, commonly known as the Elkins Bill, requires carriers in all cases to publish their tariffs, and prohibits, under severe penalty, any practice upon the part of the carrier "whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariff, . . . or *whereby any other advantage is given or discrimination is practiced.*"

We think these divisions, if not in violation of the express language of the second section of the original Act, are plainly within the prohibition of the Elkins Bill. When the Santa Fe Railway pays to the Illinois Northern Railroad \$12.00 for the moving of a car loaded with the traffic of the International Harvester Company from the McCormick works to its Corwith yard, a service which it might exact under its contract for \$1.00, for the performance of which \$3.00 is a reasonable compensation, which was never exceeded previous to January 1, 1904; and when it does this in order to obtain the traffic of the International Harvester Company, it thereby grants that Company in effect a rebate of \$9.00 upon that carload of freight. It certainly is guilty of an act by which an advantage is given and a discrimination is produced in favor of the International Harvester Company. As already said, if such a proceeding is not in violation of law, there is no limit to the granting of preferences

to whatever shipper has the means of building and operating a railroad.

It is urged that all this is simply an arrangement between two connecting railroads; that there is no negotiation with the shipper, and no payment to the shipper. This is a mere play upon words. The Illinois Northern Railroad Company and the International Harvester Company are one and the same thing. It is entirely immaterial whether this money goes in the first instance into the treasury of the International Harvester Company or that of its creature, the Illinois Northern Railroad Company. That subterfuges of this sort cannot avail has been often decided, and was affirmed within the year by the Supreme Court of the United States in *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563, in which it was held that it made no difference whether certain contracts were entered into with a railroad company itself or with a coal company the stock of which was entirely owned by the railroad company.

It is said that competition necessitates the allowance of these divisions, and that they are not of unusual amount. It is undoubtedly true, that many instances may be found in which divisions as great or greater than those under investigation are allowed by one connecting road to another for the performance of no greater service than is here involved; it is quite probable that the files of this Commission may afford such illustrations; but such cases are not in point. There the railroads are principals. The division is granted to obtain traffic which the railroad controls, or to gain a corresponding advantage at some other point of connection, or in some other respect. Here the International Harvester Company is the principal, not the Illinois Northern Railroad Company. It is to obtain the traffic of that Company, a shipper, not a carrier, that these divisions are allowed; and it is because all parties understand that the Harvester Company is the ultimate beneficiary that four times the sum which has in the past been accounted as reasonable is today paid for the performance of these switching services.

In a certain view, competition does force the allowance of these divisions. In the same sense, competition compels the 10 I. C. C. REP.—26.

granting of most rebates and the allowance of most preferences. If one grants these divisions, all must grant them or lose the traffic. If one line pays the rebate, all must follow; but this does not make the act lawful.

The manifest intention of the Act to regulate commerce, especially as expressed in the Elkins Bill, is to strike through all pretense, all ingenious device, to the substance of the transaction itself. So, viewing this transaction, there is not the slightest doubt that the granting of these divisions is the allowance of a preference to the International Harvester Company, which is in violation of law. There is no substantial distinction between this case and that of *Re Transportation of Salt from Hutchinson, Kansas*, 10 I. C. C. Rep. 1.

It has been seen that the Illinois Northern Company handles much traffic aside from that originating at the McCormick plant, and that divisions are allowed upon much of this traffic. The question, therefore, arises: Does a division granted with respect to traffic not received from the International Harvester Company amount to an unlawful concession in favor of that Company? In our opinion, it does. While it might in a sense be held that a division paid for the handling of a carload of traffic from the International Harvester Company was a rebate or a preference with respect to that particular car, still it is more correct to say that the whole arrangement is in the nature of a discrimination in favor of this shipper, and that discrimination is created by the allowance of divisions upon traffic not originating with it, just as really as upon traffic which it furnishes. The essential thing is that all divisions are allowed because the International Harvester Company owns this railroad, and as a concession to that company. A general payment to a shipper or the performance of a general service for a shipper might be unlawful even though it were impossible to apply it to any particular traffic.

The question presented by the operations of the Chicago, West Pullman & Southern Railroad differs from that involved in those of the Illinois Northern in that the International Harvester Company owns a controlling interest in the West Pullman Company, but has not the entire ownership. Other industries along

10 I. C. C. REP.

its line are stockholders to some extent—just how far does not appear. This does not, however, in our opinion, change the situation. The fact that these shippers obtain by their part ownership of this road an advantage which inures to them in proportion to their ownership, does not divest the transaction of its illegal character. A joint payment to two shippers may work a preference, if so understood and intended. In the case before us, while other parties are in reality interested, the International Harvester Company is, without doubt, the overshadowing factor.

In our opinion, then, the payment of anything in excess of \$3.00 per car in case of the Chicago, West Pullman & Southern, and of \$3.50 per car in case of the Illinois Northern under the circumstances developed in this case, is an illegal concession to the shippers owning those railroads. Of course, the compensation allowed these roads may be either by an arbitrary switching charge or by a division of a joint rate, the one being as legal as the other. We have stated what would, in our opinion, amount to a reasonable charge in dollars per car, because that has in the past been the usual method followed in arriving at the compensation allowed.

The Chicago, Lake Shore & Eastern, as found, is the creature of the United States Steel Corporation. The questions presented by its operations differ from those already discussed, chiefly in that the practices are of longer continuance and of wider scope. The International Harvester Company, through the medium of its railroads, obtains no divisions whatever from eastern lines; but the United States Steel Corporation, with its greater power, has been able to force from eastern connections divisions on all business. The International Harvester Company has not yet been able to compel the railroads which handle its traffic to maintain its tracks or perform its switching service within its iron working plant at South Chicago; but the Illinois Steel Company has for the last eight years obtained from the railways transporting its traffic compensation for the maintenance and operation of the miles of track which are located within its private works. In this respect the Steel Trust, to use the popular expression, is as far in advance of the Harvester Trust as the latter Company is ahead of the ordinary shipper.

10 I. C. C. REP.

It has been seen that the Chicago, Lake Shore & Eastern, by virtue of its trackage rights, is enabled to handle large quantities of traffic from point of origin to destination. Whenever this movement is interstate, a tariff is filed with the Commission and the rate paid by the United States Steel Corporation. In these operations there seems to be no violation of law, although there may be an advantage to that corporation. If the Steel Trust can build and operate a railroad cheaper than it can hire transportation from some other railroad, that is its privilege, assuming that it acts within the limitations of its charter.

This railroad also handles large quantities of traffic between connecting roads and the various plants which formerly belonged to the Illinois Steel Company. With respect to that traffic, it bears exactly the same relation to the United States Steel Corporation that the Illinois Northern does to the International Harvester Company. It is entirely owned by that Corporation, and an excessive charge paid to it inures entirely to the advantage of that Corporation. These extravagant divisions are allowed because it is owned by that corporation. To the extent that they exceed a reasonable charge for the performance of the service they are, in our opinion, an unlawful preference in favor of that Corporation. Just how far they do exceed what is reasonable cannot be determined upon this record; but while we cannot affirm the exact amount by which the Illinois Steel Company has profited through these illegal practices in the past, or just how far the United States Steel Corporation is profiting today, the amounts are certainly enormous; sufficient unquestionably, for the payment of dividends upon millions of capitalization.

This being a general investigation in which no specific charges have been formulated against particular defendants no order can be made, nor would any order apparently add to the prohibition of the statute itself. The inquiry will be continued into other similar practices, and whatever means the law affords employed to stop those above referred to.

No. 699.

EDWARD G. DAVIES

v.

THE PERE MARQUETTE RAILROAD COMPANY, and
THE MICHIGAN CENTRAL RAILROAD COMPANY.

Decided January 5, 1905.

Complainant alleged the collection by defendants of charges in excess of the tariff rate on certain shipments of fruit from Michigan points to Chicago, and an unlawful contract with a delivering agent in Chicago, and thereupon complainant insisted that defendants had been guilty of penal offenses under the law which should be reported for prosecution. The complainant disclaimed at the hearing any demand for damages or reparation. The facts show errors in charges arising from lack of knowledge by the agent at Chicago of the kind of package used, or the actual contents of the package shipped to complainant, the shipments having been unloaded by complainant, and also from a practice by the agent of the initial carrier at one point temporarily used as a receiving station for fruit, of making a charge in addition to the freight rate without the knowledge of the railroad company. The compensation paid to the delivering agent in Chicago for unloading and handling the freight in that city was apparently reasonable. *Held*, upon consideration of the evidence, that defendants were not guilty of any wilful or intentional violation of the law.

G. W. Plummer for Complainant.

Shaw & Strawn for Defendants.

John T. Marchand for the Commission.

REPORT AND OPINION OF THE COMMISSION.

YEOMANS, *Commissioner*:

The complaint in this case alleges in substance:

That complainant is a general consignee and distributor of
10 I. C. C. REP.

fruits and vegetables, having his principal office and place of business in Chicago, Illinois; that this proceeding is instituted in behalf of complainant and other shippers of fruit, vegetables and other products from points in Michigan and other places on defendants' lines, and localities where such shipments originate; that defendants are common carriers by railroad, subject to the Act to regulate commerce, engaged in transportation between interstate points, and particularly between Bravo, Pearl, Fennville, Harbert, Sawyer, Livingston, Bridgeman, Stevensville, and other points in Michigan and Chicago, Illinois; that overcharges were made in six instances on shipments of fruit over defendants' lines from Bravo, Pearle and Fennville, Michigan, to complainant at Chicago, during the months of August and September, 1902; that similar discriminations in rates charged complainant and other persons have been made by defendants on shipments from points in Michigan to Chicago during the six years previous to the filing of this complaint; that it is the duty of defendants to unload said shipments at Chicago at their own expense; that this is done for certain consignees, but that during said six years defendants have refused and still refuse to do so for complainant and certain other consignees, by reason of which they are subjected to unreasonable discrimination, prejudice and disadvantage, and other parties are given undue and unreasonable preference and advantage; that defendants during said period have exacted of complainant a higher rate for shipments made from Harbert, Michigan, to Chicago than from Livingston, Sawyer and other points in Michigan to the same destination, in violation of the Act to regulate commerce, thereby subjecting the locality of Harbert and persons shipping from there to undue prejudice and disadvantage; that the published schedules of defendants applying to the transportation of fruit and vegetables do not plainly show charges therefor, or the terminal charges, or the rules and regulations affecting such transportation, in consequence whereof section 6 of the Act is violated; that defendants wholly disregard the published rules of the official classification by which such transportation is governed; that defendants do not deal directly with complainant

and shippers of fruit over defendants' lines, but delegate or have delegated their duties respecting consignments to a certain person who acts as a middleman between defendants and consignees, by means of which the duties and obligations of defendants are concealed from consignees; that such person acting under such agency has collected a greater charge upon such shipments than the published rates; and that the defendant, the Pere Marquette Railroad Company, issued to its local agents in Michigan a circular requiring them to refuse to receive property for shipment to Milwaukee, Wisconsin, in other than carloads, unless consigned for distribution to a consignee or consignees designated and named by said defendant, said circular being contrary to the published rules and tariffs of said defendant and in violation of the provisions of said section 6.

Complainant asks for an order requiring defendants to desist from the alleged violations of law and pay complainant such damages as the Commission may find him entitled to recover, and for such other order or orders as may be deemed necessary in the premises.

The answer of the Pere Marquette Railroad Company denies any violation of law and states that the unloading of shipments at Chicago and the collection of charges thereon were wholly under the supervision of the Michigan Central Railroad Company, its connecting carrier.

The answer of the Michigan Central Railroad Company denies any violation of law, denies the allegations of overcharge made by defendant, and avers that no claim for said overcharges has ever been presented to defendant for settlement.

The answer states that prior to June 13, 1900, defendants' joint tariffs from stations in the Grand Rapids district (Michigan) showed a rate for carloads and less than carloads; that the carload rate was less than the less than carload rate; that shippers of fruit and vegetables were allowed to consolidate their shipments and consign an entire carload in each instance to one consignee at the carload rate; that during said time complainant, designating himself as "General consignee of Granger Cars," aided organizing fruit and vegetable growers into shipping associations and consolidating small shipments into

10 I. C. C. REP.

carloads for shipment at carload rates and consignment to himself at Chicago, which he would unload and distribute to the various receivers and for which he charged the shippers association, \$5.00 per car for unloading, a compensation for delivery, and a portion of the difference between the carload rates and the less than carload rates; that on the 13th of June, 1900, a tariff adopted by defendants' roads became effective providing a rate per package for any quantity less than a carload for shipments of fruit and vegetables from certain Michigan territory to Chicago, substantially the same as the former charge per package in carload lots, which tariff or amendments thereto and similar tariffs have continued in force up to the time of filing complaint; that under said package tariff defendants issued separate bills of lading for each shipment, checking out each consignment and unloading all less than carload lots at destination at defendants' cost; that defendants entered into an agreement with one N. K. Goodrich, August 9, 1900, to perform the duty of unloading this traffic for which a special platform was constructed; that the said Goodrich unloaded such shipments, distributed the same to the receivers, collected the freight charges, and paid the same to defendants; and that said contract continued in force until about January 21, 1903, when the same was rescinded.

The complaint and both answers were duly verified.

On the hearing of the complaint, November 9, 1903, before commencement of the investigation or the taking of any testimony, complainant voluntarily struck out of his complaint all claim for damages or reparation, and stated that the purpose of complainant was to present to the Commission evidence of criminal violation of the law and ask the Commission "to take such steps under the law as are necessary to punish these railroads for those acts of criminal violation."

The question of whether the rates complained of were reasonable or unreasonable was not investigated, the Commission holding that the complaint did not allege unreasonableness, and, therefore, the defendants could not be required to meet such an allegation without due notice and opportunity given to prepare their defence.

The following instances of alleged violation of law were specially urged by complainant and relied upon in support of the request for prosecution:

(1) Overcharge on a shipment from Bravo, Mich., August 17, 1902, described in the waybill as "fruit," but having a memorandum attached showing the consignment to consist of baskets of peaches and plums from six different shippers consigned to complainant, and charged a rate of $47\frac{1}{2}$ c. per hundred pounds.

(2) Overcharge on a shipment from Pearl, Mich., August 19, 1902, of 14 baskets of "peaches," and charged a rate of $47\frac{1}{2}$ c. per hundred pounds.

(3) Overcharge on a shipment, August 14, 1902, from Bravo, Mich., composed of the following articles: 30 bbls. apples, 39 bus. boxes apples, 81 half-bus. crates plums, 534 fifth-bus. baskets peaches; which were charged the carload rate of \$40.00.

(4, 5 & 6) Three instances of overcharge on shipments from Fennville, Mich.: August 28, 1902, 41 bbls. apples; August 29, 1902, 44 bbls. apples; September 3, 1902, 49 bbls. apples; all billed as "peaches," for which there was charged a rate of 30c. per bbl.

(7) The rate of 2c. per hundred pounds in excess of the published rate exacted for shipments of fruit from Harbert, Mich.

(8) That the contract made with Goodrich was unlawful and unjustly discriminatory against complainant and other consignees and shippers.

In the first three items of overcharge complained of the waybills did not show in what kind of baskets the peaches were shipped. Under the classification peaches in wooden-top baskets are first class, and in other baskets $1\frac{1}{2}$ first class. These shipments were unloaded and delivered by complainant as consignee without defendants' agent having any actual knowledge of the contents, and the rate clerk, failing to learn, on inquiry made of complainant, what kind of baskets they were, charged the shipment at $1\frac{1}{2}$ first class in the expense bill.

In the other three cases of overcharge complained of the ship-
10 I. C. C. REP.

ments were apples, but the waybills showed them to be shipments of barrels of peaches. These also, it seems, were unloaded and delivered by complainant. No information appearing in regard to the character of the shipments except that contained in the waybills, they were charged the rate on peaches of 30c. per bbl., instead of the rate on apples of 17c. per bbl.

The evidence shows that Harbert is only a shipping point during the fruit season, and so used for the convenience of shippers living near that station. Consent was first given by the Railroad Company that a lady running a grocery store there might sell passenger tickets, and, later, consent was given for the shipment of fruit during the fruit season. On account of the accommodation afforded the shippers in that locality in shipping from Harbert rather than from the regular stations farther away, an arrangement was made between the husband of the lady and the local shippers for the payment of the additional rate complained of. This rate appeared in the billing and was paid by the agent to the producers. It only continued during the season of 1902 and did not come to the knowledge of the railroad management until afterwards.

It does not appear that complainant was the owner of any of the above shipments on which he claimed overcharges, and it is significant that no claim is shown to have been ever presented to defendants by either shippers or receivers on account of the overcharges.

The package tariff referred to was established from Benton Harbor and points south to meet competition of boats from St. Joseph, Mich., to Chicago in connection with drays and wagons going through that territory and picking up freight in the interest of the boat line from St. Joseph.

The contract with Goodrich provided for the unloading of fruit from certain Michigan territory at the fruit platform in Chicago, without expense to either shippers, consignees, or receivers, for which service Goodrich received a stipulated, and what appears to have been a reasonable compensation; he also distributed the fruit to the receivers or consignees, collected the charges for transportation and paid them over to the railroad

agent. The evidence does not show that any discrimination was practised under this arrangement either towards complainant or any one else. It may have had some effect on the volume of complainant's business as general consignee, who had previously, as also had Goodrich and other consignees, distributed such freight to the receivers.

While defendants endeavored to inform shippers of the advantages to be derived under the package tariff, the proof does not show that the Pere Marquette Railroad Company refused to accept such freight unless consigned to Goodrich or some other special consignee.

The evidence does not sustain complainant's claim that defendants refused to unload at the freight house, at reasonable hours, freight consigned to him, or that complainant was refused the use of the fruit platform, except during the continuance of the Goodrich contract; neither does it establish the claim that defendants are guilty of unjust discrimination against complainant in this respect.

Evidence was offered respecting a charge of \$25.00 each for the refrigeration of two cars of fruit claimed to have been exorbitant. This subject, however, has been recently under investigation by the Commission in another proceeding. (See Report and Opinion of the Commission "In the Matter of Charges for the Transportation and Refrigeration of Fruit Shipped from Points on the Pere Marquette and Michigan Central Railroads.")

After careful consideration of all the evidence the Commission is unable to arrive at the conclusion that the defendants were guilty of any wilful or intentional violation of the law.

10 I. C. C. REP.

No. 683.

WM. WRIGLEY, JR.,

v.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY; THE PENNSYLVANIA COMPANY; THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY; THE CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY; THE ILLINOIS CENTRAL RAILROAD COMPANY; THE LOUISVILLE & NASHVILLE RAILROAD COMPANY; THE SOUTHERN RAILWAY COMPANY; THE MOBILE & OHIO RAILROAD COMPANY; THE CENTRAL OF GEORGIA RAILWAY COMPANY; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE SEABOARD AIR LINE RAILWAY; AND THE ATLANTIC COAST LINE RAILROAD COMPANY.

THE COWART-LOFTON COMPANY, Intervener.

Decided January 5, 1905.

Defendants' rule, providing that the minimum charge upon any single shipment of freight shall be for 100 pounds at the class or commodity rate applying upon the article, which is in force in the territory roughly described as south of the Ohio and Potomac and east of the Mississippi rivers, and also on traffic shipped to that territory from points in the Central West, *held*, upon the facts in this case, not to be unreasonable or unjustly discriminating in its application to complainant's traffic. No opinion expressed as to the legality of the rule upon traffic generally.

10 I. C. C. REP.

W. Stevens Lewis for Complainant.

S. O. Bayless for Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

G. W. Kretzinger for Chicago, Indianapolis & Louisville Railway Company.

Ed. Baxter for Illinois Central Railroad Company, Louisville & Nashville Railroad Company, Mobile & Ohio Railroad Company, Central of Georgia Railway Company, Seaboard Air Line Railroad Company, and Atlantic Coast Line Railroad Company.

Ed. Baxter and *Claudian B. Northrop* for Southern Railway Company.

REPORT AND OPINION OF THE COMMISSION.

YEOMANS, *Commissioner*:

Complainant alleges that under the name of Wm. Wrigley, Jr., & Co., he is engaged at Chicago, Illinois, in the manufacture, sale and shipment of chewing gum, in small lots but large aggregate quantities, and other articles, as premiums for the sale of chewing gum; that defendants are common carriers by railway from points in Illinois to points south of the Potomac and Ohio and east of the Mississippi rivers, and are subject to the Act to regulate commerce; that the rules and regulations of The Official Classification of Freight are observed and enforced by defendants in territory east of the Mississippi and north of the Ohio and Potomac rivers, and the rules and regulations of the Southern Classification in territory east of the Mississippi and south of the Ohio and Potomac rivers; that complainant is engaged in the shipment of the freight articles above named over defendants' lines to points in said Southern Classification territory; that previous to February 16, 1903, the Southern Classification provided that the minimum charge on a single shipment of one class should be for 50 pounds at the class or commodity rate to which it belonged, but if classified higher than 1st Class the minimum charge should be for 50 pounds at the first class rate, subject to a minimum charge of 25 cents; that this provision was observed and enforced by de-

10 I. C. C. REP.

defendants operating south of the Ohio and Potomac and east of the Mississippi rivers; that on the 16th day of February, 1903, an amendment to said rule was made so that the minimum charge was based on 100 pounds instead of 50 pounds, and that said amendment has been adopted, enforced and observed by said defendants operating in said territory; that by reason of said amendment to said classification rules and its enforcement complainant has been subjected to excessive, unjust and unreasonable rates and charges for the transportation of shipments in lots of less than 100 pounds, and that complainant and others and their traffic have been thereby subjected to unjust discrimination and undue prejudice and disadvantage, in violation of the provisions of sections 1, 2 and 3 of the Act to regulate commerce.

Complainant asks for an order requiring defendants to cease and desist from enforcing the said amendment to the rules and regulations of the Southern Classification, and limit their charges to those in force previous to the adoption of said amendment. Complainant also asks reparation for alleged overcharges collected from him since the adoption of said amendment.

Defendants' answers admit the adoption and observance of the amendment to the rules and regulations of the classification referred to, allege that the charges made thereunder are just and reasonable, deny that complainant or others are thereby subjected to any unjust discrimination, or any undue or unreasonable prejudice or disadvantage, and deny that defendants have violated the law by reason of such action.

An application was made by the Cowart-Lofton Co., a corporation of Arlington, Ga., engaged in the manufacture and shipment of merchandise, for leave to intervene in behalf of complainants, alleging like unjust discrimination and prejudice by reason of the adoption and enforcement of the amendment in question, and asking for similar order and relief; and leave to intervene was granted by the Commission.

FACTS.

The complainant is engaged in the manufacture, sale and

10 I. C. C. REP.

shipment of chewing gum in Chicago, Ill., and also in the shipment of articles as premiums for the sale of chewing gum. Such shipments are usually made in small lots of less than one hundred pounds from Chicago, Ill., to various points, among them Atlanta, Ga., Montgomery, Ala., Chattanooga, Tenn., and other places, south of the Potomac and Ohio rivers and east of the Mississippi River.

The defendants are carriers by railway and conduct the transportation of complainant's freight above described.

In establishing freight rates the common carriers of the United States generally fix their charges by weight, and usually on the basis of 100 lbs.

For the more systematic, uniform and convenient transportation of small shipments, carriers by railway have adopted and observe certain rules and regulations for the classification of freight. The Official Classification governs transportation in territory east of Lake Michigan, Chicago and the Mississippi River and north of the Ohio and Potomac rivers. The Southern Classification governs transportation east of the Mississippi and south of the Ohio and Potomac rivers.

The following provision of the Southern Classification was in force prior to February 16, 1903:

"Unless a higher minimum is specified in published tariffs, the minimum charge on a single shipment of one class, classified first class or lower shall be for 50 lbs. at the class or commodity rate to which it belongs; but if classified higher than first class the minimum charge shall be for 50 lbs. at the first class rate."

On the 16th of February, 1903, this provision was amended so that the minimum charge should be based upon 100 lbs. instead of 50 lbs. and said amendment was adopted and has since been enforced by the railways in Southern Classification territory.

The following methods of making the minimum charge on single shipments have been adopted and observed by the railroads in Southern Classification territory for the periods stated, viz.:—

10 I. C. C. REP.

First class, per 100 pounds, but not less than 25c., from 1876 to 1879;

Class rate of 50 pounds, but not less than 25c., from 1879 to 1881.

From 1881 to 1891, class rate of 100 pounds, but not less than 25c.

From 1891 to June 1894, the actual weight, but not less than 25c.

From June 1894 to November 1894, class rate per 100 pounds, but not less than 25c.

From November 1894 to May 1898, actual weight, but not less than 25c.

From May 1898 to June 1898, class rate per 100 pounds, but not less than 25c.

From June 1898 to September 1898, actual weight, but not less than 25c.

From September 1898 to February 16, 1903, class or commodity rate for 50 pounds, but not less than 25c.

February 16, 1903, to present time, class or commodity rate for 100 pounds.

From the foregoing it will be seen that the method or rule now in force has been followed for nearly eleven years of the time from 1876 to 1903, and for a considerably longer period than any other method.

Complainant shows, by way of illustration, the difference in charge for a 50 lb. shipment prior and subsequent to February 16, 1903, when the change in the rule complained of was made, as follows:

CHICAGO TO ATLANTA.

Prior to February 16, 1903,	78 cents
Since February 16, 1903.....	147 "
Increase on a shipment of 50 pounds.....	69 "

CHICAGO TO MONTGOMERY.

Prior to February 16, 1903.....	73 cents
Since February 16, 1903.....	138 "
Increase on a shipment of 50 pounds.....	65 "

CHICAGO TO CHATTANOOGA.

Prior to February 16, 1903.....	63 cents
Since February 16, 1903.....	115 "
Increase on a shipment of 50 pounds.....	52 "

The following table shows the rates now in force, with distances, from Chicago to Atlanta, Ga., Montgomery, Ala., and Chattanooga, Tenn., and the classification of chewing gum under the Southern Classification:

INTERSTATE COMMERCE COMMISSION.

AUDITOR'S OFFICE.

December 3rd, 1904.

STATEMENT SHOWING CLASS RATES AND RATES ON CHEWING GUM AND MILEAGE.

FROM CHICAGO, ILLINOIS.

Rates governed by Southern Classification.

(In cents per hundred pounds.)

Miles.	To	1	2	3	4	5	6	A	B	C	D	E	H	F bbl.
733	Atlanta, Ga.													
	Rates prior to													
	Feb. 16, 1903.	147	126	106	85	71	58	40	47	38	34	61	68	68
	Present Rates.	147	126	106	85	71	58	40	47	38	34	61	68	68
748	Montgomery, Ala.													
	Rates prior to													
	Feb. 16, 1903.	138	126	103	80	67	53	40	43	34	30	61	48	60
	Present Rates.	138	126	103	80	67	53	40	43	34	30	61	51	60
595	Chattanooga, Tenn.													
	Rates prior to													
	Feb. 16, 1903.	116	99	82	64	55	42	32	38	33	29	47	48	58
	Present Rates.	116	99	82	64	55	42	32	38	33	29	47	51	58

Classification by the Southern Classification of Chewing Gum. Prior to February 16th, 1903, to present date, 2nd Class (Any Quantity).

C. & O. T. A. ICC 77 and 105.

R. G. B.

It appears from the evidence that in the shipment of less than carload lots of freight, or small shipments, the same amount of clerical work is required, making of bills of lading, 10 I. C. C. REP.—27.

receipts, expense bills, the duplication and copying of same, rate calculation, transfer to connecting lines, notice to consignees, receipt of freight and division among carriers conducting transportation, whether it be a small shipment or one of several hundred pounds, the only difference being in the manual labor necessary in loading, transferring and unloading. By way of illustration it is shown that a shipment from Chicago by connecting lines to Jacksonville, Florida, would receive attention from and come under the jurisdiction of perhaps fifty different persons; and that in case the package should become mislaid or stolen the tracing thereof would require ordinarily not less than twenty-five written communications. It appears also that small packages are much more liable to be lost, misplaced or stolen than larger ones, and occasion more trouble in tracing; whereas the cost of clerical labor is as much for a small as for a large package or shipment, and there is little if any difference in the cost of other labor. In respect to all these conditions there has been no change since February 16, 1903, from conditions existing previously. For these reasons small package freight is not considered as desirable traffic as larger shipments, either on the basis of 50 lbs. or 100 lbs. minimum.

The carrying capacity of a car loaded with miscellaneous small packages or shipments is ordinarily much less than when loaded with a single shipment, from ten to thirteen thousand pounds being the limit of loading capacity for small package freight, of a thirty-six foot car with a carrying capacity of 50,000 lbs.

It is shown that the Official Classification provides as follows:

"No single package or small lot of freight of one class will be taken at less than 100 lbs. at first class rate and in no case will the charge for a single shipment be less than 25 cents.

"A small lot of freight of different classes will be taken at actual weight at the class rate of each article provided that the aggregate charge for the shipment shall not be less than for 100 lbs., at first class rate, and in no case shall the charge for the entire consignment be less than 25 cents."

10 I. C. C. REP.

This rule has been in force in Official Classification territory since September 26, 1898, in which territory the population and volume of traffic are much more dense than in other sections of the country. Prior to that date the minimum charge was based on 100 lbs. at the class rate.

The average earnings on all classes accruing to all carriers from Chicago to Atlanta per package is 69.2 cents, and if commodities were included the average would be less, commodity rates being lower than class rates.

The following table shows the average earnings of each of the connecting lines named on less than carload shipments of all classes of freight from Louisville, Ky., and Evansville, Ind., to Atlanta, Ga., and Jacksonville, Florida, and the length of haul by each line.

To Atlanta, Ga.		
L. & N. R. R.....	185 miles,	20.3 cents
N. C. & St. L.....	151 "	16.6 "
W. & A.	138 "	15.1 "
<hr/>		
Total	474 "	52 "

To Jacksonville, Fla.		
L. & N. R. R.....	185 miles,	10.9 cents
N. C. & St. L.....	151 "	8.9 "
W. & A.	138 "	8.1 "
Macon	90 " }	13.9 "
Jessup	147 " }	
S. F. & W.....	115 "	6.8 "
<hr/>		
Total	826 "	48.6 "

The following table shows the traffic in shipments of 50 lbs. or less during the month of January, 1903, from Cincinnati, Ohio, over the L. & N. R. R. to points on that road and connecting lines.

10 I. C. C. REP.

Total No. of shipments.....	1908
Total weight	75,012 lbs.
Total freight revenue	\$850.97
Total revenue accruing to the L. & N. R. R.....	\$555.95
Total miles hauled over the L. & N. R. R.....	542,887
Average weight per package.....	39.3 lbs.
Average revenue per package.....	44.6 cts.
Average L. & N. R. R. revenue per package.....	28.8 cts.
Average distance hauled by the L. & N. R. R.....	284.5 miles

On the 100 lbs. minimum basis the revenue would have been twice the amount stated.

The above is fairly illustrative of the relation between shipments, weight, revenue and length of haul for such traffic over defendants' lines to points in Southern Classification territory. The length of haul and accruing revenue from Chicago traffic to the same destinations would present greater averages.

CONCLUSIONS.

It is reasonable and proper that carriers should fix a minimum weight and charge for the transportation of less than carload shipments. This is justified by the necessary expense and trouble attending the carriage of such shipments, large or small, which, aside from the actual manual labor involved, are practically the same irrespective of the weight or bulk of the package. Therefore, the only question presented for determination is whether or not the rule in force is reasonable, and not unjustly discriminative in its application.

The amount of clerical work required in the shipment, transfer to connecting carriers and delivery of a shipment, the records of the same necessary to be kept, the division of the freight charges among the carriers participating in the transportation of this traffic, is shown to be considerable, and justifies a higher charge proportionally than for large shipments. Such higher charge is also justified by the limited car capacity of package freight as compared with carloads of other freight. Illustrative of the minimum revenue per carload, one witness testified to an instance of the carriage of a car of package

freight aggregating 1520 lbs. for which the revenue on the 50 lbs. minimum basis was only \$4.36.

Complainant claims that the rule fixing the 50 lbs. minimum charge had been in force for a long time and therefore should not be disturbed. It must be observed, however, that many changes have been made in this rule in the last twenty-five or thirty years, and that the present rule has been followed for a much longer period than any other. Also that in a large section of country, more dense in population and having a larger volume of traffic, a still greater minimum weight is fixed for package freight.

While it is true that the freight charges on packages of 50 lbs. or less have been doubled by the adoption of the rule in question, the charges therefor do not average as high as the charges for similar traffic under the Official Classification by which all package freight under 100 lbs. weight is rated as first class.

The liability to loss of small packages through theft or being mislaid is much greater than in the case of large packages, and entails correspondingly more trouble and difficulty in tracing.

There has not been sufficient disclosure of the effects of the operation of the rates made effective by the change in the rule in question upon all kinds of traffic to justify unqualified approval of the same in its general application, but the Commission does not upon the facts appearing find that the same is unreasonable or unjustly discriminative in its application to the complainant's traffic.

The complaint is therefore dismissed.

10 I. C. C. REP.

No. 660.

PAXTON TIE COMPANY
v.
DETROIT SOUTHERN RAILROAD COMPANY.

Decided January 7, 1905.

Between December 16, 1902, and April 6, 1903, defendant unjustly discriminated against complainant in furnishing cars for the shipment of cross ties by refusing to provide any cars for such shipments by complainant, while it did furnish cars to other persons for the interstate shipment of lumber, stone and many other freight articles, and also supplied cars for the shipment of cross ties destined almost entirely for its own use. Reparation in the sum of \$630 awarded to complainant.

P. J. Farrell for the Commission.

Dickinson, Stevenson, Cullen, Warren & Butzel for Defendant.

REPORT AND OPINION OF THE COMMISSION.

FIFER, *Commissioner*:

Complainants allege that on December 16, 1902, and at divers other times thereafter to and including February 25, 1903, defendant unduly discriminated against them in the matter of furnishing cars, in violation of section 3 of the Act to regulate commerce, whereby they were greatly damaged; and that during the same time defendant neglected to publish its schedules of rates, fares and charges, as required by section 6 of said act. Complainants ask reparation for the damages they claim to have suffered in the premises.

Defendant, in its answer, denies the alleged violations of
10 I. C. C. REP.

law and advances some new matter in explanation and justification of the discrimination complained of.

Facts deemed material to a determination of the questions thus presented are found as follows:

FINDINGS OF FACT.

During all the times mentioned herein the complainants, J. Pearce Clagett and Ernest E. Rockhold, have been engaged as partners in the purchase, shipment and sale of cross ties, under the name of "Paxton Tie Company." They have been purchasing ties in the vicinity of Bainbridge, Ohio, shipping them over defendant's line of railway and other lines connecting therewith to market points in other states and selling them to different parties located at the latter points.

Defendant is a common carrier of interstate traffic and furnishes the only transportation facilities enjoyed by the locality of Bainbridge.

Complainants began business on or about December 20, 1901, and until December 16, 1902, obtained all the cars they required. Between the latter date and April 6, 1903, defendant neglected and refused to furnish complainants any cars, although they repeatedly made requests therefor.

On December 16, 1902, defendant's car service agent issued an order, directed to defendant's agent at Bainbridge, the body of which reads as follows: "On account of the extreme shortage of cars—coal cars at our mines—we will be unable to place any more for ties (excepting company ties) until further notice." On December 31, 1902, the car service agent issued another order, directed to defendant's agents at Bainbridge, Waverly and Beavertown, the body of which reads: "Referring to my letter of December 16th, file 2848, placing restriction on loading coal cars with ties (except company ties) until further notice. This will apply to box, flat and stock cars."

On January 22, 1903, a like restriction was placed upon shipments of wood and fence posts, but it was immediately removed from wood, and the record shows that during the 10 I. C. C. REP.

early portion of January several carloads of posts were shipped from Bainbridge.

Although defendant was, during the time in question, engaged in the transportation of lumber, stone and many other freight articles, it placed no restrictions on shipments, except as above.

Reasons advanced by defendant for discriminating against ties were, the scarcity of cars and the necessity of furnishing them for shipments of coal and other fuel and grain.

Defendant filed statements showing shortage at and shipments from points on its road as follows: Between December 16, 1902, and April 6, 1903, the average daily shortage was 405 cars, while between December 1, 1902, and April 1, 1903, the average of daily shipments was 434 cars. It will thus be seen that the shortage was not the equivalent of one day's supply.

During the winter of 1902-1903 coal and other fuel was very scarce in markets of consumption, and shippers therefore made urgent demands upon defendant for cars in which to make shipments of fuel. Grain dealers were also demanding more cars than they could obtain. But the record shows that cars which cannot be used either for shipments of coal or grain can be and are used for shipments of ties; that is to say, cars having bad floors or leaky roofs. It also shows that between December 1, 1902, and April 1, 1903, 65 cars of ties and 207 cars of other traffic were shipped from Bainbridge, while during the same time the average of shipments from all points on defendant's line, as above stated, was 434 cars per day. Of the ties shipped it appears that all except 6 carloads were company ties. Of these, 1 was loaded by a competitor of complainants, without the knowledge of defendant, and the other 5 were shipments made in cars furnished by the Pennsylvania Company with the understanding that the ties should be shipped to a point on the Wheeling & Lake Erie Railroad.

Complainants contend that defendant wilfully discriminated against their tie traffic because it wished to prevent the shipment of ties off its line of road.

Defendant made through rates formerly from points on its

10 I. C. C. REP.

road to points on other roads both on ties and lumber. It has continued this practice as to lumber, but for some time previous to August 29, 1903, it discontinued its through rates on ties. This subjected complainants to the payment of local rates which were greater in the aggregate than the through rates they had previously paid; whereupon, they undertook to persuade defendant's president to re-adopt the former practice. In reply to a letter written on behalf of complainants defendant's president said: "In the matter referred to we are simply following what we consider our interests, which is to prevent the shipment of tie timber out of the country so far as we may be able to do so lawfully, by refusing to make rates *less than lumber rates* * * * ." In a letter written by the same officer to complainants we find the following statement: "I am not uninformed as to the tie situation. The arrangements heretofore in effect for the purchase of its ties by this company have been entirely satisfactory and I am in sympathy neither with the effort to raid the established business of another man nor with the enforced competition resulting from an attempt of that kind, which would affect the treasury of this company in the way of increased prices for its own consumption of ties * * * ."

In these letters defendant's president intimates that complainants asked for rates less than lumber rates; that they were interfering with the established business of another man; and that they were endeavoring to compel defendant to pay more than it had previously paid for ties.

By discontinuing through rates on ties and continuing them on lumber defendant rendered the rates on ties greater than those it was then exacting on lumber, because the through rates on the latter traffic were less than the sums of the local rates on the former.

While defendant was refusing to furnish cars to complainants, as aforesaid, the latter were competitors of defendant's tie agents, who were then purchasing ties in the vicinity of Bainbridge, and Bainbridge is one of the most important tie points on defendant's road. Also, between the date when complainants began business and the date of the hearing in this 10 I. C. C. REP.

case, prices paid by complainants and others for ties in the vicinity of Bainbridge advanced to the extent of about 5 cents per tie. The manufacturers of ties were benefited by the competition created by complainants. The defendant desired to protect its tie agents from competition as far as practicable and thus obtain ties for its own consumption at lower prices than it would otherwise be compelled to pay. It sought in effect to confine the market in ties to its own line.

Between December 16, 1902, and April 6, 1903, defendant wrongfully discriminated against complainants in the matter of furnishing cars for interstate shipments of cross ties. The discrimination was undue because it was not justified by scarcity of cars, as claimed by defendant, and has not been otherwise justified.

Complainants claim they were damaged to the extent of \$2,100 by the discrimination aforesaid; that is to say, that profits lost by them which they would otherwise have obtained aggregated that amount; but evidence concerning damages was indefinite and unsatisfactory. However, we think it fairly appears, and find, that between December 16, 1902, and the date of the filing of the complaint in this case, namely, February 25, 1903, complainants felt compelled to and did refuse to purchase 9,000 ties which were offered to them and which they would have purchased if defendant had not refused to furnish them cars; that they could have sold these ties at a profit of 7 cents each; that the ties were afterwards purchased by complainants' competitors; and that, therefore, the damage suffered by complainants by reason of the discrimination complained of was \$630.

Complainants' allegation that defendant neglected to publish its schedules of rates, fares and charges is fully sustained by the record. However, after the complaint in this case was filed defendant posted a notice in its depot at Bainbridge stating that tariffs of rates for transportation of freight and passengers are on file for public inspection and can be seen upon application to agent.

CONCLUSIONS.

Based upon the foregoing findings of fact, we conclude that the discrimination practised by defendant against complainants was a violation of section 3 of the Act to regulate commerce, and that defendant should make reparation to complainants for the damage suffered by them in consequence of such discrimination, which, as above stated, is \$630. A suitable order will be entered and served.

The provisions of section 6 of the Act are not complied with by posting a notice stating that tariffs may be inspected upon application to the carrier's agent. In such case no order of the Commission is necessary, and any action based upon failure of a carrier to publish its rates as required by that section must be in accordance with the procedure defined in the statute.

The relation between the rates on lumber and ties is not complained of in this proceeding, and no opinion upon the disparity in those rates is now expressed.

10 I. C. C. REP.

THE CHICAGO LIVE STOCK EXCHANGE

v.

THE CHICAGO GREAT WESTERN RAILWAY COMPANY; THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY; THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY; THE CHICAGO & ALTON RAILWAY COMPANY; THE CHICAGO & NORTH WESTERN RAILWAY COMPANY; THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY; THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY; THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY; THE ILLINOIS CENTRAL RAILROAD COMPANY; THE IOWA CENTRAL RAILWAY COMPANY; THE KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS RAILROAD COMPANY; THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY; THE MISSOURI PACIFIC RAILWAY COMPANY; THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY; THE OMAHA, KANSAS CITY & EASTERN RAILROAD COMPANY; THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY; THE WABASH RAILROAD COMPANY; and THE WISCONSIN CENTRAL RAILWAY COMPANY.

THE RAILROAD & WAREHOUSE COMMISSIONERS OF THE STATE OF MINNESOTA; THE ST. PAUL UNION STOCK YARDS COMPANY OF ST. PAUL, MINNESOTA; THE SOUTH ST. JOSEPH LIVE STOCK EXCHANGE; THE UNION STOCK YARDS COMPANY OF OMAHA, NEBRASKA; THE SIOUX CITY STOCK YARDS COMPANY; and THE SIOUX CITY LIVE STOCK EXCHANGE OF SIOUX CITY, IOWA, Interveners.

Decided January 7, 1905.

1. The complainant, an incorporated association, is entitled under section 13 of the Act to regulate commerce to bring and maintain a proceeding of this character.
2. The defendant, the Atchison, Topeka & Santa Fe Ry. Co., removed the discrimination complained of as to its lines, and it appeared that the defendant, the St. Louis & San Francisco Railroad Co., does not participate in the rates in question. Complaint as to those lines dismissed.
3. Defendants exact higher rates for transporting cattle and hogs than for transporting live-stock products to Chicago from points west, northwest and southwest thereof, including Missouri River points and South St. Paul, Minn. Upon all the facts and circumstances, *Held*:

1. That such discrimination is not justified by difference in cost of transportation or otherwise, and subjects the traffic in cattle and hogs at Chicago and other points, and those interested therein, to undue and unreasonable prejudice and disadvantage, and gives to the traffic in the products of hogs and cattle, and to shippers and localities interested in such traffic, undue and unreasonable preference and advantage, in violation of the Act to regulate commerce. *Chicago Board of Trade v. C. & A. R. Co.*, (4 I. C. C. Rep. 158) reaffirmed and the principle therein announced extended to the transportation of cattle and their products.

2. That the desire of a carrier to secure additional business for its line of road does not justify a change in the relation of rates resulting in a higher rate upon cattle and hogs, the raw material, than upon live-stock product, the manufactured article, where, as in this case, the articles are in sharp competition with each other in markets of purchase and sale, where it appears that upon other lines and in other sections rates are generally no higher, and in many instances much lower, on the traffic prejudiced than on that favored by the change, and where numerous and important industries, which have been built up and maintained under the former adjustment, and those interested in such industries, will be injuriously affected by the action taken.

S. H. Cowan and T. W. Tomlinson for complainant.

A. B. Stickney and F. B. Kellogg for C. G. W. Ry. Co.

W. B. Biddle for A., T. & S. F. Ry. Co.

Thomas Wilson for C., St. P., M. & O. Ry. Co.

Wm. Brown and F. A. Wann for C. & A. Ry. Co.

Thomas Miller and O. M. Spencer for the Burlington Lines.

Geo. R. Peck and Burton Hanson for C., M. & St. P. Ry. Co.

W. T. Rankin for C., R. I. & P. Ry. Co.

R. A. Jackson for C., R. I. & P. Ry. Co. and B., C. R. & N. Ry. Co.

10 I. C. C. REP.

S. F. Andrews for I. C. R. R. Co.

T. N. Gill for W. C. Ry. Co.

C. N. Travous for Wabash R. R. Co.

Ira B. Mills and *C. F. Staples* for the R. R. & W. Com. of Minn.

Milchrist & Scott for Sioux City Stock Yards Co. and Sioux City Live Stock Exchange.

F. T. Ransom for Union Stock Yards Co. of Omaha.

M. D. Flower for St. Paul Union Stock Yards Co.

Horace Wood for South St. Joseph Live Stock Exchange.

REPORT AND OPINION OF THE COMMISSION.

FIFER, *Commissioner*:

The subject-matter of the complaint in this case is the rates exacted by defendants for transporting live stock and its products in carloads to Chicago from points west, northwest and southwest thereof, including South St. Paul, Minn., and points on the Missouri River, Sioux City, Iowa, to Kansas City, Mo., inclusive. Complainant alleges that the live-stock rates are unreasonable *per se*, and relatively unreasonable compared with rates applied on the products; that defendants' adjustments of rates between live stock and its products subject complainant, the locality of Chicago and producers of live stock in the states of Iowa, Missouri, Wisconsin and Minnesota to undue and unreasonable prejudice and disadvantage; and that by reason of the premises defendants are violating sections 1 and 3 of the Act to regulate commerce. Complainant also alleges that said adjustments are in violation of the rulings of this Commission in *Chicago Board of Trade v. Chicago & Alton R. Co. et al.*, 4 I. C. C. Rep. 158, and *Squire & Co. v. Michigan Central R. Co. et al.*, 4 I. C. C. Rep. 611.

In their answers, defendants, generally, deny the alleged violations of law. The St. Louis & San Francisco Railroad Company denies participation in the live-stock rates complained of; the Wabash Railroad Company denies complainant's right to institute this proceeding; and some of the other defendants

allege that complainant is an unlawful association, its purpose being to restrain, limit and destroy competition in trade.

The interveners deny that the adjustments of rates complained of, so far as they apply to live stock, as between Chicago on the one hand and the localities represented by the interveners respectively on the other, subject complainant, the locality of Chicago or producers of live stock in the states of Iowa, Missouri, Wisconsin and Minnesota to undue and unreasonable prejudice or disadvantage.

Facts deemed material to a determination of the questions thus presented, to the extent that we think it expedient to pass upon them at this time, are found as follows:

FINDINGS OF FACT.

Complainant is an incorporated association. Its principal office and place of business are at Chicago, Illinois. Its members are engaged in the purchase, shipment and sale of live stock for themselves and upon commission. Some of them own large farms in the territory under consideration where they raise live stock for the market, while others are interested as packers in the products of live stock. The purposes for which complainant was organized, as stated in its charter, are: "To establish and maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to provide for the speedy adjustment of all business disputes between its members; to facilitate the receiving and distributing of live stock, as well as to provide for and maintain a rigid inspection thereof, thereby guarding against the sale or use of unsound or unhealthy meats; and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits."

Apparently, the St. Louis & San Francisco Railroad Company does not participate in the live-stock rates, and for this reason that company will not be included in the statements hereinafter made.

The other defendants, according as their various lines or routes may run, are engaged as common carriers of interstate traffic, including live stock and its products, between different

10 I. C. C. REP.

points in the territory described. They all reach Chicago and one point or more on the Missouri River, either directly or in connection with other lines, but only a few of them are directly interested in the traffic carried between Chicago and South St. Paul. Some of them own lines which run westerly, north-westerly and southwesterly from the Missouri River.

Chicago is now and for many years has been the largest live-stock market in the United States; but during recent years packing houses have been erected and important live-stock markets built up at South St. Paul, Minn., Sioux City, Iowa, South Omaha, Neb., South St. Joseph and Kansas City, Mo., and at other points on the Missouri River. There are also many packing houses and live-stock markets of importance at different points in the territory lying between Chicago and the Missouri River. To a very large extent all these markets receive their supply of live stock from the same territory; that is to say, from points in states west of Chicago and east of the Rocky Mountains. An important portion of the products is shipped by way of Chicago and the Atlantic Seaboard to foreign countries and large shipments are also made by way of Chicago to consuming markets in the eastern part of the United States. Under these circumstances, the importance of establishing and enforcing rates for the transportation of live stock and its products that are relatively just and reasonable will be readily observed. The higher the rate on the live stock compared with the rate on the products the greater the difficulty of moving the former and the more freely the latter will move, over long distances. To illustrate: Other things being equal, if Chicago, compared with Kansas City, is 100 miles nearer the consuming market but 100 miles farther from the point where the live stock is raised, whether or not the live stock will be slaughtered at Chicago will depend largely upon whether or not the rate on the live stock to Chicago plus the rate on the products from Chicago to the consuming market is more than the rate on the live stock to Kansas City plus the rate on the products from Kansas City to the consuming market.

Efforts to buy and sell in common territory, made by parties located and doing business at different points outside of that

10 I. C. C. REP.

territory is called market competition; but market competition, so far as it relates to rates of transportation, can be made effective only through the instrumentality of common carriers. It often happens that the interests of carriers serving the same territory are in conflict, and under such circumstances, one carrier will sometimes make a rate on a particular kind of traffic that will result in considerable injury to persons and localities interested in another kind of traffic, and also to competing carriers, and, apparently, this is what has happened in the present case.

Live stock and its products are in sharp competition with each other in the different markets, and some of the defendants are more interested in the former than in the latter and *vice versa*. Those whose lines reach Chicago and also run through live-stock districts in states west, northwest and southwest of the Missouri River desire the long haul they will obtain if the live stock is shipped to Chicago, while those whose lines terminate at the river wish the live stock to be slaughtered there, because this will give them an opportunity to participate in hauling the products. And this conflict of interest appears to be largely responsible for the adjustment of rates complained of.

Aside from the rates in question, carriers generally make rates on live stock somewhat, and in many cases considerably, lower than on the products. This was formerly true concerning rates made by carriers operating between the Missouri River and Chicago; but soon after the large packers erected packing houses at different points on the Missouri River changes began to take place. The tonnage controlled by the packers was comparatively large, and this fact enabled them to obtain secret concessions from individual carriers. These concessions, being discovered by other interested carriers, were followed by open reductions in the published rates applied on the products. As corresponding reductions were not made in the live-stock rates the relation formerly existing between live stock and its products became changed. The rate on packing house products from Missouri River points to Chicago was finally made 5 cents per 100 pounds less than on live hogs; whereupon, complaint was filed with this Commission, which led to an investigation that was

10 I. C. C. REP.—28.

followed by the decision in the Chicago Board of Trade case *supra*. The rates complained of in that case pertained to transportation to Chicago from Missouri River points and points in the states of Iowa and Missouri intermediate between the Missouri River and Chicago. The Commission found that the cost to the defendants of transporting live hogs was not greater than the cost of transporting packing house products; held that under the circumstances disclosed by the record the discrimination against the former traffic was unlawful, and issued an order requiring the defendants to cease and desist from exacting higher rates for transporting live hogs than for transporting packing house products from said shipping points to Chicago. This order was issued on November 3, 1890, and was complied with by the defendants on January 1, 1891.

The subject-matter of the complaint in the Squire & Co. case *supra* was the rates exacted by the defendants for transporting cattle and hogs and their products from Chicago to Boston and other eastern points. After stating that live stock and its products were bought and sold in competition with each other in the markets and relating the circumstances surrounding their transportation the Commission held that the different rates should be based upon cost of carriage, but as the record did not contain data from which such cost could be ascertained no order was made.

The interests of carriers operating lines running easterly from the Missouri River are such that the rates from the different points on the river to Chicago and other eastern destinations are usually the same on the same kind of traffic. A reduction made by a carrier at one point is ordinarily followed by corresponding reductions made by interested carriers at the other points. This is of course necessary to prevent a diversion of the traffic.

The distance from St. Paul to Chicago is about 400 miles and the average distance from the Missouri River points to Chicago is about 500 miles.

The rate from St. Paul to Chicago in each instance is about 80 per cent of the rate to Chicago from Missouri River points, and carriers serving St. Paul endeavor to maintain this relation;

‘10 I. C. C. REP.

but a reduction made in a rate from St. Paul might or might not be followed by a corresponding reduction from the Missouri River.

Although sheep are properly included in the term "live stock," practically no evidence was adduced concerning them or their transportation, and the parties to this proceeding ignored them almost entirely in their briefs and oral arguments; consequently, the term live stock as used herein is intended to cover only cattle and hogs.

The local rate from the Missouri River to Chicago is ordinarily made the maximum on shipments to Chicago from points intermediate between Chicago and the river and is applied to all points in a territory ranging from 100 to 150 miles in width and lying immediately east of the river. The rates to Chicago from points east of said territory are somewhat less and are graded with some regard to distance. What has been said about local rates on live stock to Chicago from the river and the intermediate points applies also to the local rates on the products; and a like method obtains in making rates on live stock and its products to Chicago from South St. Paul and points intermediate between those places.

Rates on live stock and its products to Chicago from Missouri River points and South St. Paul have ranged as follows: At the time the order referred to was complied with the rate from the river on live hogs and packing house products was made 22 cents per 100 pounds. The rate from the river on cattle was then $23\frac{1}{2}$ cents, except that from Sioux City it was 25 cents; and these relations continued, with one unimportant exception, until December 1, 1894. At the latter date the rates were made the same on cattle and hogs and their products; namely, $23\frac{1}{2}$ cents, except that the rate from Sioux City on cattle was not changed; and this adjustment was adhered to, except for short periods, until January 1, 1902. Between December 1, 1894, and January 1, 1902, except, possibly, for short periods, rates from South St. Paul were: On cattle 25 cents, on hogs 27, on packing house products $18\frac{1}{2}$, and on fresh and dressed meats 20. On January 1, 1902, a rate of $18\frac{1}{2}$ cents, called a proportional rate, was established and put in force from the 10 I. C. C. REP.

river on live-stock products destined to points east of the Indiana-Illinois state line, but no other changes were made, either from the river or from South St. Paul. This adjustment continued until April 14, 1902, but meanwhile and on April 5 the complaint in this case was filed.

The first hearing was held at Chicago on May 15, 1902. At that time an officer of the Chicago, Milwaukee & St. Paul Company, speaking for his company and also for the other defendants, made a motion for an adjournment until some time in the month of July, and in support of the motion said: "It is the policy and the general practice of western roads to make their rates from the west and northwest to Chicago arbitrarily, regardless of destination. It is not obligatory. They do it when they can. Certain conditions have arisen which have made it necessary to depart in some respects from that policy, but those conditions will doubtless end with the 30th day of June next, and it is believed that thereafter the revision of the rates on live stock and live-stock products will be satisfactory to all persons interested; and for this reason we ask for a postponement." He further stated that it was the intention of the defendants to make such adjustments as would accord with the order hereinbefore referred to. Upon this representation the hearing was adjourned until June 16, 1902, and it was afterwards postponed until the 6th day of the following November.

After the complaint was filed changes were made in the rates as follows: On April 14, 1902, a proportional rate of $18\frac{1}{2}$ cents was put in force from the river on live stock either originating at points west of the river or destined to points east of the Indiana-Illinois state line, leaving the local rate to Chicago still $23\frac{1}{2}$ cents. On August 8, 1902, pursuant to a contract entered into between the Chicago Great Western Company on the one hand and all packers doing business at the Missouri River points on the other, that company established and put in force from Kansas City and St. Joseph on the products of live stock a rate of 20 cents on traffic destined to Chicago and a rate of $18\frac{1}{2}$ cents on traffic destined to points east of the Indiana-Illinois state line. The contract provided that these rates should remain in force seven years, in consideration whereof the pack-

ers agreed to deliver to the Chicago Great Western a certain percentage of their traffic in the products, or, upon failure to do so, pay it each month, by way of liquidated damages, an agreed amount for each car short. The action of the Chicago Great Western was followed by other interested carriers and corresponding rates were put in force from the other Missouri River points, while rates from South St. Paul were put in force as follows: On packing house products, 15 7/10 cents when destined to Chicago and 14 6/10 when destined to points east of the Indiana-Illinois state line; and on fresh and dressed meats, 17 cents when destined to Chicago and 15 7/10 when destined to points east of the Indiana-Illinois state line. On August 11, 1902, the Atchison, Topeka & Santa Fe Company made a 12-cent rate to Chicago from Kansas City and intermediate points on live stock, and other carriers followed this action to the extent of making a 12-cent proportional rate from the river on live stock originating at points west of the river. On January 1, 1903, the Atchison Company cancelled the 12-cent rate and made a rate of 18½ cents to take its place. This action was followed by the other carriers to the extent of canceling the 12-cent proportional rate and making a proportional rate of 18½ cents to take its place. On March 1, 1903, the Atchison Company put in the place of its 18½-cent rate a rate of 20 cents and made a proportional rate from the river on live stock destined to points east of the Indiana-Illinois state line of 18½ cents; whereupon the other carriers substituted for their 18½-cent proportional rate a proportional rate of 20 cents and made another proportional rate from the river on live stock destined to points east of the Indiana-Illinois state line of 18½ cents.

Since the latter date no changes in the rates have been made. It will thus be seen that the expectations of defendants, as voiced by the officer of the Chicago, Milwaukee & St. Paul Company at the hearing on May 15, 1902, have not been realized, and the disparities in the rates are greater now than they were at that time. The Atchison Company is the only one of the defendants that is complying with the order in the Chicago Board of Trade case, hereinbefore mentioned. That company exacts
10 I. C. C. REP.

from Missouri River points the same local rate and the same proportional rate on live stock that it exacts on the products of live stock, and makes the local rate, namely 20 cents, the maximum from the intermediate points. On the other hand, while the other defendants operating between the Missouri River and Chicago follow the Atchison Company rates so far as the rates on the products and the proportional rate on the live stock are concerned, they exact from the river on live stock a local rate of 23½ cents and make that rate the maximum from the intermediate points; that is to say, the local rate they exact from the river, and which is made the basis of rates from the intermediate points, is 3½ cents per 100 pounds more on live stock than on the products of live stock. And the defendants that carry live stock and its products to Chicago from South St. Paul and points intermediate between those places charge rates for the transportation that are very much higher on the former traffic than on the latter.

Since all, or nearly all, the live stock carried easterly from the Missouri River is shipped there in the first instance from other points, practically no shipments are made from the river to Chicago upon the local rates in force between those points, and such rates are therefore important, principally, because of their effect upon rates from the intermediate points.

At the hearing on November 6, 1902, on motion of complainant, the complaint in this case, so far as it related to the Atchison, Topeka & Santa Fe Railway Company, was dismissed.

As applied to the other defendants that operate between the Missouri River and Chicago, it is substantially accurate to say that the matters advanced by them in justification of the discrimination complained of, are as follows: The Chicago Great Western contends that the discrimination is justified, first, by difference to the carriers in the cost of transportation, and second, by competition created by the packers, as hereinbefore described. The other defendants rely for their justification upon the competition created by the Chicago Great Western Company in making said contract and publishing and enforcing rates in accordance with its provisions.

Matters advanced in justification by the defendants that op-

erate between South St. Paul and Chicago, as will be herein-after explained, are somewhat different.

Generally speaking, the live stock is carried in cars owned by the carriers, while the products are carried in refrigerator cars owned by the packers. The refrigerator cars are nearly always returned empty to the shipping points, while 20 per cent or more of the live-stock cars are returned loaded.

The carriers pay the packers for the use of the refrigerator cars 1 cent per mile for each mile the cars are transported, and make settlements among themselves at the rate of 6 mills per mile for the use of the live-stock cars. The former cars are much more expensive to build than the latter.

Evidence concerning weights of the cars used and the revenue-paying and other traffic carried in them was very conflicting, but we think fair averages would be about as follows:

PACKING HOUSE PRODUCTS.

Car	36,000	pounds.
Revenue-paying load	28,000	"
Ice and other preservatives	3,000	"
Car, on return trip	36,000	"
		<hr/>
Total weight carried for revenue received	103,000	"
		<hr/>
Revenue on 28,000 pounds at 20 cents per 100	\$56.00	
Less mileage from and to point of shipment	10.00	
		<hr/>
Net revenue received	\$46.00	
Revenue per 100 on total weight hauled, 4 cents and about 5 mills.		

FRESH AND DRESSED MEATS.

Car	36,000	pounds.
Revenue-paying load	21,000	"
Ice and other preservatives	4,000	"
Car, on return trip	36,000	"
		<hr/>
Total weight carried for revenue received	97,000	"
		<hr/>
Revenue on 21,000 pounds at 20 cents per 100	\$42.00	
Less mileage from and to point of shipment	10.00	
		<hr/>
Net revenue received	\$32.00	
Revenue per 100 on total weight hauled, 3 cents and about 3 mills.		

CATTLE.

Car	26,500	pounds.
Revenue-paying load	22,000	"
Bedding, manure, etc.	2,000	"
Car, on return trip.	26,500	"
		<hr/>
Total weight carried for revenue received.	77,000	"
		<hr/>
Revenue on 22,000 pounds at 20 cents per 100.	\$14.00	
Less mileage from and to point of shipment.	6.00	
		<hr/>
Net revenue received.	\$38.00	
Revenue per 100 on total weight hauled, 4 cents and a little more than 9 mills.		

HOGS.

Car	26,500	pounds.
Revenue-paying load	17,000	"
Bedding, manure, etc.	2,000	"
Car, on return trip.	26,500	"
		<hr/>
Total weight carried for revenue received.	72,000	"
		<hr/>
Revenue on 17,000 pounds at 20 cents per 100.	\$34.00	
Less mileage from and to point of shipment.	6.00	
		<hr/>
Net revenue received.	\$28.00	
Revenue per 100 on total weight hauled, 3 cents and about 9 mills.		

If there should be a scarcity of cars the weights of the revenue-paying loads above stated would be somewhat increased, and we think the increases pertaining to packing house products and fresh and dressed meats would be greater than those pertaining to either cattle or hogs; but on account of the mileage received by them the packers do not, ordinarily, load very much in excess of the minimums required by the carriers, which are: On packing house products, 26,000 pounds; and on fresh and dressed meats, 20,000. The minimums pertaining to live stock vary according to the kind of live stock shipped and the length of the car used in each instance. The length of the car most generally used is 33 feet and 9 inches, and minimums pertaining

to such a car are: On cattle, 22,000 pounds; and on hogs, double-deck, 22,000, and single-deck 17,000.

Further variations in the above comparisons might result from differences in incidental expenses pertaining to the different classes of traffic at terminals and while en route.

Packing house products and fresh and dressed meats are loaded and unloaded by the shippers. Live stock is nearly always loaded at the intermediate points by the shippers, without expense to the carriers, but the president of the Chicago Great Western stated that the carrier pays the stock yards company, in each instance, for loading, a fee which ranges from 25 cents to \$1.50 per car. No explanation of the wide range in expense thus indicated was made, and a similar claim as regards expense was not made by any of the other defendants. The carriers pay the expense of unloading at Chicago, which is 25 cents per car, but this is included in a terminal charge of \$2 per car, which is exacted on live stock, in addition to the transportation charges above specified.

Trains carrying packing house products or fresh or dressed meats are stopped at different points en route to afford an opportunity for re-icing the cars, but the re-icing is done at the expense of the shippers. On the other hand, the carriers bear the expense of spraying hogs while in transit during hot weather, and the expense of cleaning the live-stock cars, the amount of which has not been definitely shown, is also borne by the carriers.

Evidence concerning risk assumed by the carriers in transporting the different kinds of traffic was very conflicting, but the damages paid are such a small percentage of the revenue received, that they are not a very important factor.

At many of their local stations the defendants furnish stock yards to accommodate shipments of live stock, but from the record it is impossible to say how much, if any, greater the expense of terminal facilities thus furnished is than the expense of terminal facilities furnished for shipments of live-stock products. In connection with some of these cattle yards defendants provide weighing facilities.

For the purpose of explaining more fully the matter of terminal expenses we quote from the testimony of an officer of the
10 I. C. C. REP.

Chicago, Burlington & Quincy Company as follows: "Terminal charges on packing house product and live stock, viz., loading and unloading charges, switching charges paid other lines, etc., are difficult of comparison; they stand in different relation at different terminal points and the comparison would not be the same in the case of any two carriers because their means of access to the place of loading and unloading are seldom the same at any one point, nor is their relative situation the same at any two points. For illustration, this company reaches the Kansas City Stock Yards with its own rails and therefore does not pay any switching charge on live stock, but is obliged to pay \$3 per car switching on packing house product shipped from the same point. At St. Joseph we pay a switching charge of \$1 per car on live stock, while the Chicago Great Western Railway pays a total of \$4 per car. We pay \$1.50 per car on packing house products shipped from St. Joseph, while the Chicago Great Western Railway pays a total of \$4.50 per car. At Chicago we pay a switching charge of \$3.50 per car on packing house product delivered at the Union Stock Yards, which charge includes return of the empty car to our tracks. We pay from \$2 to \$5 per car for switching service on packing house product delivered on other lines in the City of Chicago; on live stock delivered at the Union Stock Yards we charge \$2 per car in addition to the regular tariff rate and pay for trackage and unloading \$1.75 per car, which does not include the cost of our own switching service. There is no difference in the practice of the several lines who deliver live stock and packing house product at Chicago and Union Stock Yards from western points."

We understand that delivery in Chicago when that point is the final destination is nearly always at the Union Stock Yards, if the traffic is live stock; also, that a large portion of the products is delivered there. But while defendants exact a terminal charge of \$2 per car for such delivery of live stock, they exact no terminal charge whatever for such delivery of live-stock products, if the traffic is shipped from a point west of Joliet, Ill. The latter point is located a short distance southwesterly of Chicago.

The freight traffic manager of the Atchison Company, testify-

ing as to the effect of terminal and other charges paid and absorbed by his company, said: "My view is that the rate on the product should be higher than the rate on the raw material. The rate of 12 cents per hundred pounds on live stock from the Missouri River to Chicago pays the Atchison road as much in gross for transporting a carload of live stock as the 18½-cent rate pays us for transporting a carload of fresh meat. By gross revenue I mean the charges we collect and retain after paying the terminal charges, switching charges, mileage, etc."

Defendants pass men free, who accompany and care for cattle and hogs while in transit, as follows: One man one way in charge of one car; one man each way in charge of two to five cars; two men each way in charge of six to ten cars; and three men each way in charge of eleven or more cars. Returning, these men ride on defendants' passenger trains.

Speed and tonnage of trains appear to be practically the same whether the traffic carried is live stock or the products of live stock. In each instance the tonnage offered is large and shipments are regularly and continuously made; and in these respects there is apparently no appreciable difference between the two classes of traffic.

Weights of products of cattle and hogs are percentages of weights of the live animals as follows: Hogs, meat products about 72 per cent, total products, including offal, fertilizer, hair, etc., about 82 per cent; cattle, meat products, 45 to 60 per cent, total products about 67 per cent.

The value of the products of cattle and hogs, pound for pound, is about twice that of the live animals.

Although defendants do not exact higher rates per 100 pounds for transportation to Chicago from intermediate points between the Missouri River and Chicago than to the same destination from the river, nor claim a right to do so, some of them contend that as the bulk of the live-stock shipments are from the intermediate points while the shipments of the products are more largely from the river and the latter traffic is often carried in full train loads from the river while the former traffic, when shipped from the intermediate points, is what might be called pick-up business, the cost of transporting the live stock is greater than the cost of

10 I. C. C. REP.

transporting the live stock products. This statement is true to the extent that the more switching done and the greater the number of stops made by a train the more expensive to the carrier the transportation service is, and more switching and stops are necessary when the shipments are from the intermediate points than when they are from the river. But the difference in cost thus indicated appears to be offset in the present case by the greater rate per ton per mile received by defendants on shipments from the intermediate points. As before stated, the rate is the same to Chicago from intermediate points in a territory ranging from 100 to 150 miles in width and situated just east of the river as from the river. The only one of defendants' operating officials who gave testimony on this point was the general manager of the Chicago, Burlington & Quincy Company, and he made replies as indicated below to questions concerning this matter.

Q. On the basis of the same rate on both live stock and the product, which would you consider the more remunerative traffic from a railroad standpoint, a train of fresh meat or packing house products from the Missouri River destined to Chicago, or a train of live stock picked up at main line stations east of the Missouri River?

A. That is a pretty difficult question to answer and I should think it was largely a matter of opinion, which would be arrived at by studying the ordinary conditions of handling the business. My judgment would be that the train of live stock would be the more remunerative of these two, although the difference might not be so very great. My reason for that is that while there are a good many expenses incident to the handling of live stock from local stations, the picking up of live stock on a division and gathering it into a train at a division point is not quite as expensive as hauling a train of the full size over the entire division. The cost per ton or per car is greater, but the total cost is not greater. The conditions in handling live stock, although they are pretty severe and pretty difficult to meet, have never been quite as severe or quite as difficult to meet as the conditions in hauling the dressed products.

Q. Make the same comparison between a train of live stock

from the Missouri River compared with a train of live stock picked up east of the Missouri River, at the same rate.

A. I should say that the train picked up at stations east of the Missouri River, assuming that the business was moving eastward, would be more remunerative than a solid train of the same number of cars and same weight picked up at the Missouri River terminal.

Packing house products and fresh and dressed meats include almost the entire products of live stock.

Carriers usually make lower rates on raw material than on its products, and all the railroad officials who testified in this case on that point, except the president of the Chicago Great Western Company, said that under normal conditions they believed the rates on live stock should not be higher, while some of them stated that in their opinion they should be lower, than on the products of live stock.

The president of the Chicago Great Western Company stated that his company entered into the aforesaid contract for the purpose of securing a greater proportion of the traffic in the products of live stock than it had previously been able to obtain.

In justification of the discrimination complained of, defendants operating between South St. Paul and Chicago, in addition to matters advanced in justification by the other defendants as above specified, contend that if live-stock rates to Chicago from points in the state of Minnesota are reduced the Railroad & Warehouse Commission of that state will reduce rates on live stock from such Minnesota points to South St. Paul.

Under the laws of the State of Minnesota the Commission referred to has power, subject to revision by courts of competent jurisdiction, after complaint made and investigation duly had to substitute for rates established by common carriers doing business in that state, for the transportation of passengers or property therein, rate established by the Commission, if it determines that the rates established by the carriers are unequal or unreasonable.

The present adjustment of rates on live stock to Chicago as compared with South St. Paul, from the Minnesota points in
10 I. C. C. REP.

question, was the result of conferences between said Commission and officials of the interested carriers.

After the complaint in this case was filed the Minnesota Commission notified the defendants referred to above as operating between Chicago and South St. Paul that if the rates on live stock from Minnesota points to Chicago were reduced the Commission would make corresponding reductions in the rates on live stock from such Minnesota points to South St. Paul.

Complainant introduced considerable evidence which showed that Chicago as compared with South St. Paul and the Missouri River markets has received a smaller proportion during recent years than prior thereto of the live stock raised in the territory under consideration, and claimed that this tended to show that the discrimination complained of has injured the Chicago live-stock market and those interested therein.

On the other hand, defendants showed that during recent years great improvements have been made in the facilities for handling live stock at South St. Paul and the Missouri River markets, including the erection of new packing houses and additions to old ones; that there has been a greater increase in the amount of live stock raised west of the river than east of it; and that live stock shipped from the river to Chicago shrinks in weight from 3 to 5 per cent while in transit; and claimed that these facts and others that are similar fully account for changes shown in the destinations of live-stock shipments.

That the facts shown would tend to produce the effect claimed for them is evident, but in that connection it is impossible to determine to what extent each of the facts was effective.

Complainant also introduced considerable evidence tending to show that the rates exacted by defendants for transporting live stock to Chicago from points in the states of Iowa, Missouri, Wisconsin and Minnesota are unreasonable *per se*, but the testimony upon that point is unsatisfactory and we do not feel justified in making a finding in relation thereto.

Based upon the foregoing, we make specific findings as follows:

The discrimination against the transportation of live stock to Chicago from the shipping points in question, brought about

10 I. C. C. REP.

by defendants' action in establishing and putting in force upon the products of live stock rates of transportation lower than those contemporaneously exacted by defendants for the transportation of live stock between the same points injured the live-stock market of Chicago and those interested therein, is not justified by difference to defendants in the cost of transportation, and is not otherwise justified, and therefore subjects the traffic in live stock and the Chicago live-stock market and those interested therein, including complainant, to undue and unreasonable prejudice and disadvantage, and gives to the traffic in the products of live stock and shippers and localities interested in such traffic undue and unreasonable preference and advantage.

CONCLUSIONS.

Complainant is an incorporated association whose members are engaged in the purchase, shipment and sale of live stock, and whether or not a purpose of its organization is, as some of the defendants have alleged, to restrain, limit and destroy competition in trade, it had a right under section 13 of the Act to regulate commerce to institute and maintain this proceeding.

Cattle Raisers' Association of Texas v. Fort Worth & Denver City Railway Company et al., 7 I. C. C. Rep. 513.

The jurisdiction of the Commission over the defendants is not denied.

In the Chicago Board of Trade case hereinbefore mentioned the Commission, after stating the circumstances and conditions surrounding the transportation of live hogs and the products of hogs, including the competitive relations existing between these two kinds of traffic, and the cost of transportation, held that the greater charge exacted by the defendants for transporting the former was unlawful, and issued an order requiring the defendants to cease and desist from charging more per 100 pounds for transporting live hogs than for transporting the products of hogs. The territory there in question was substantially the same as that now under consideration, and, as shown in the findings of fact, essential conditions have not changed materially since. It follows, therefore, that if the order referred to was right when issued the discrimination complained of, so far as it relates to

10 I. C. C. REP.

the transportation of hogs and their products to Chicago from the river and points intermediate between the river and Chicago, is unlawful. And if it is unlawful to exact a higher rate on hogs than on their products it is unlawful to charge more for transporting cattle than for transporting the products of cattle, because the relation between the live animal and its products is substantially the same in each case, and, at the same rate, the net revenue per 100 pounds received by defendants for transporting cattle is greater than the net revenue on equal tonnage received by them for transporting hogs.

Packing house products and fresh and dressed meats include almost the entire products of live stock, and although at the same rate per 100 pounds the traffic in packing house products pays, above cost of transportation, a greater revenue than the traffic in either fresh or dressed meats, defendants make no difference in their rates on that account. They also charge the same rates for transporting cattle that they exact for transporting hogs.

If cattle and hogs are considered together on the one hand and packing house products and fresh and dressed meats on the other it will be seen that after deducting mileage according to payments made by defendants the revenue received by them compared with the paying and non-paying tonnage hauled is greater at the same rate on live stock than on the products of live stock. But expenses incidental to the transportation do not apply equally to the different classes of traffic.

Although the products of live stock are shipped to some extent from packing houses located at some of the intermediate points and the local rate from the river is made the maximum for such shipments, generally speaking, the local rates in question apply to live stock shipped from the intermediate points and products of live stock shipped from Missouri River points and South St. Paul, because the bulk of the live-stock shipments in question is from the intermediate points while shipments of the products are largely from the river and South St. Paul.

At intermediate stations where the tonnage of live stock shipped is considerable defendants provide, for the accommodation of this traffic, cattle yards, and, in many instances, weighing

facilities. This is an expense that does not apply to shipments of the products; but, on the other hand, the switching and terminal charges paid on the products at Missouri River points and absorbed by defendants, although not definitely shown, are large, and fully sufficient, we think, to offset terminal expenses on live stock at the intermediate shipping points.

Apparently, the switching and terminal charges paid by defendants at Chicago, when that point is the final destination, are the same whether the traffic is live stock or the products of live stock, except that defendants pay 25 cents per car for unloading the live stock and also pay for cleaning the live-stock cars, and we understand that nearly all the former traffic and a large portion of the latter is delivered at the Union Stock Yards; but while defendants exact a terminal charge of \$2 per car for such delivery of live stock they make no terminal charge whatever for such delivery of live-stock products when the shipments are from points west of Joliet, Ill. The latter point is located a short distance south-westerly of Chicago.

Another expense incidental to the transportation of live stock that does not apply to the products is that connected with the transportation of men who accompany the live-stock shipments. Such transportation subjects defendants to some additional risk, but we think this risk is about the only expense connected with the transportation of the men that should be considered in connection with the transportation of the live stock. These men take care of the stock while in transit and thus relieve defendants of duties they would otherwise have to perform, and the carriage of the men free is incidental to, and cannot be considered separately from, the transportation of the live stock. But whatever the expense to defendants thus caused may be, we are convinced that it is offset, and more than offset, by the fact that 20 per cent or more of the live-stock cars are returned to the shipping points loaded, while refrigerator cars are nearly always returned empty.

There are a few other differences in cost of transportation, but they are not very important and have been fully explained in the findings of fact; we do not deem it necessary, therefore, to notice them here in detail.

After a careful consideration of all matters disclosed by the record we conclude that the discrimination complained of is not justified by difference to defendants in the cost of transportation. And this was the view expressed by some of defendants' officials. The freight traffic manager of the Atchison Company, as hereinbefore stated, testified that from the Missouri River to Chicago a 12-cent rate on live stock is as profitable as a rate of 18½ cents on fresh meat. But this might be true when applied to transportation by the Atchison Company although not true when applied to transportation by some of the other defendants. What are called "out-of-pocket" expenses, which are paid by the defendants and because of which no charges in addition to the regular rates of transportation are exacted from shippers, vary according to the variations in location of defendants' respective lines of railway.

In making calculations concerning cost of transportation we have endeavored to describe the general situation and have not attempted to give in detail the differences that exist between the different lines operating in the territory under consideration; first, because it would be impossible to state such differences accurately, and, second, because although we think cost of transportation is a very important element we do not consider it a controlling element in this case.

In determining what the relation should be between the rates charged for transporting two different freight articles value is often an important factor; but this is not alone because of the greater risk connected with the transportation of the more valuable article. Improvements made during recent years in the road-beds and equipment of carriers have rendered the item of risk in many cases of little consequence. The value of the article is important, principally, because of its bearing upon the value to the shipper of the transportation service; and the value of the service is, and has always been considered by carriers, one of the important elements to be considered when fixing the rates to be charged for transportation. As stated in the findings of fact, live-stock products, compared with the live animals, are about twice as valuable.

Another very important factor is the relation existing between

the articles transported. If the relation is remote, such as that between flour and silk, a change of a few cents per hundred pounds in the rates charged for transporting one of them may not affect traffic in the other; but if the relation is close, such as that between raw material on the one hand and goods manufactured from that material on the other, a slight change in the adjustment of transportation charges between the two articles may be sufficient to close manufacturing plants at some points and increase the output of plants located elsewhere. And it is because of this difference that some discriminations made by carriers are justifiable under certain circumstances.

The competition between live stock and the products of live stock is very severe both in the markets of purchase and in the markets of sale, and live stock raised in the vicinity of the Missouri River is now and for many years has been transported to and slaughtered at different points in territory lying between that river and the Atlantic Seaboard. Packing houses at these different points have been established and maintained under rates of transportation which, generally speaking, have not been higher, while in many instances they have been lower, on the live stock than on the products; and the principle governing this adjustment, namely, that the rates on raw material shall not be greater than on the products of the material, has been applied in nearly all other cases of a similar nature. It is therefore apparent that if the matters of defense advanced in this case are held to justify the discrimination complained of many other discriminations of a like nature may result.

But some of the defendants contend that it is natural and therefore proper for live stock to be slaughtered at or near the points where it is raised. They say that if this is done shrinkages in weights and other waste that would otherwise result will be avoided.

The record shows that live stock shrinks some in weight while in transit, and this is naturally an advantage to the near-by market and one to which it is entitled, but such natural advantage does not justify a discrimination in rates in favor of the near-by market which would otherwise be unlawful. The record also shows that it is practicable to transport live stock long distances

10 I. C. C. REP.

and that this has been done continuously for many years. Commissioner Bragg, in delivering the opinion of the Commission in the *Chicago Board of Trade Case, supra*, referring to the live-stock business, said: "A business like that, involving the preparation for and consumption of such a large and leading staple and necessary of life as meat, with all the competition that exists for it, is too large to be done in a corner." We think this dictum was true at the time the decision in that case was rendered and is true now, and that the relations of rates on these highly competitive kinds of traffic should not be adjusted with reference to the interests of any particular market or markets. Rates relatively just and reasonable should be established, regardless of results that may ensue, and the live stock should be allowed to go wherever it will under such circumstances.

Several of defendants' officers gave testimony concerning the relation that should exist between the rates on live stock and its products, and, with the exception of the president of the Chicago Great Western Company, expressed the opinion that, as a general proposition, the rates on the former traffic should not be higher than on the latter, while some of them said the rates on the manufactured product should be higher than on the raw material. But they stated that the rates on live-stock products, provided for in the contract aforesaid, are unreasonably low; that they had no voice in making such rates, but were compelled to accept them in order to secure a fair share of the traffic; that the carriers represented by them respectively would suffer great loss if compelled to establish corresponding rates on live stock; and that, therefore, they believed the discrimination complained of, so far as it relates to such carriers, is justifiable. The president of the Chicago Great Western stated that his company entered into the contract for the purpose of securing more of the traffic in the live-stock products than it had previously been able to obtain. It is therefore evident that, as regards responsibility for the discrimination under consideration, the position of the Chicago Great Western Company is somewhat different from that of the other defendants.

It is undoubtedly true that the Chicago Great Western Company had a right to change its rate on packing house products

10 I. C. C. REP.

for the purpose of increasing its business, but that right is qualified by the prohibition that that company shall not unduly discriminate against another kind of traffic; and when that company established and put in force from Kansas City and St. Joseph to Chicago rates on the products of live stock that were lower than rates it was then exacting between the same points on live stock it unduly discriminated against the latter traffic. This conclusion is based upon all the circumstances and conditions surrounding the transportation of and the relation existing between these two classes of traffic, which have been fully explained above and need not be repeated here. As it appears to us, a contrary holding would be equivalent to saying that a quasi-public servant may use its franchise for the purpose of building up some markets and destroying others, if in its judgment its stockholders will be benefited by such action. The large interests affected, the immense amount of money invested, the many live-stock markets and packing centers that have been built up and maintained under the former relation of rates, and the injury that will result if the change in that relation is permitted to continue, amply warrant the conclusion that the discrimination in question is not justified by the desire of the Chicago Great Western Company to benefit its stockholders by increasing its business.

Having held that the action of the Chicago Great Western Company in reducing the rate on the products from Kansas City and St. Joseph without making corresponding reductions in the live-stock rate was unlawful, the like ruling must be made as to the other defendants who have followed that company in making the disparity complained of effective. The rate on the products was reduced from the other Missouri River points and South St. Paul because it had been reduced from Kansas City and St. Joseph and reduced from the intermediate points because it had been reduced from the river, and all the defendants have been and are practicing at these various points an unlawful discrimination against live-stock traffic. Therefore, whether the unlawful practice was begun by one or by another is not a matter of great importance. It is apparent that should we issue an order only against the Chicago Great Western requiring it to restore the former relation of rates and the order should be complied

10 I. C. C. REP.

with, the principal ground of justification now advanced by the other defendants would be removed; and unless such action of the Chicago Great Western were followed by the other defendants it would become necessary to issue another order against the latter. Moreover, higher rates on live stock were being charged by a number of the other defendants as well as the Chicago Great Western before the Chicago Great Western contract was made and at the time the complaint was filed.

The defendants operating between South St. Paul and Chicago contend that if rates on live stock from points in Minnesota intermediate between South St. Paul and Chicago are reduced to Chicago the Minnesota Commission will make corresponding reductions from such Minnesota points to South St. Paul. This contention was supported by testimony of a member of that commission, who stated that, in his opinion, the present adjustment of live-stock rates, as between South St. Paul and Chicago, is fair, and that, therefore, any reduction to Chicago, unless followed by a corresponding reduction to South St. Paul, would make the relation unequal. If such relation is now just (concerning which we express no opinion) and in complying with any order that may be made in this case these defendants reduce the rates to Chicago, corresponding reductions to South St. Paul should of course be made. This also applies to similar contentions of the interveners representing interests at points on the Missouri River.

The defendant, the St. Louis & San Francisco Railroad Company, is not engaged in the carriage of live stock to Chicago, and as to it the complaint should be dismissed. The formal order will also show the dismissal of the Atchison, Topeka & Santa Fe Railway Company, heretofore allowed upon motion of complainant's counsel. As to the other defendants an order will be entered, in accordance with the conclusions above expressed, requiring them to cease and desist from making any higher charge for the transportation of live stock than they contemporaneously enforce for the carriage of products of live stock, between the points involved in this case.

KNAPP, *Chairman* (concurring) :

While I agree with nearly everything said in the foregoing report and opinion, I feel bound to express my doubt whether the action of the Chicago Great Western did not, as regards the other carriers, introduce a competitive condition which creates or justifies an exception to the general rule. To my mind the competition brought about by that action is not easily distinguishable in legal effect from the competition which the Supreme Court in various decisions has held a valid excuse for discriminations claimed to be unlawful. Nor is it altogether clear to me that any order which the Commission has authority to make in this proceeding is likely on the whole to promote the public advantage. Nevertheless I am so unwilling, even under the circumstances here disclosed, to sanction a rate adjustment which I regard as fundamentally wrong, and which if permitted in this case would in my judgment establish a dangerous precedent, that I am constrained to concur in the findings and conclusions of my associates.

10 I. C. C. REP.

No. 741.

MERSHON, SCHUETTE, PARKER & COMPANY

v.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PENNSYLVANIA RAILROAD COMPANY.

Decided January 13, 1905.

Defendants' rates for transporting lumber in carloads to points on the New York & Long Branch Railroad are made by adding to the rate to New York, N. Y., an arbitrary charge of 5 cents per 100 pounds when the shipping point is Saginaw, Mich., but only 2 cents per 100 pounds when the shipping point is Buffalo, N. Y. Water competition between Buffalo and New York affects the rates to New York, but it justifies no wider difference in the rates from Saginaw and Buffalo to these interior destinations than exists in the rates from these shipping points to New York. *Held*, That the discrimination is undue and in violation of the Act to regulate commerce.

Humphrey & Grant for complainant.

Francis I. Gowen and *Geo. V. Massey* for Pennsylvania Railroad Company.

R. W. de Forest for Central Railroad Company of New Jersey.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, *Commissioner*:

The complainant is a corporation engaged in the manufacture of lumber at Saginaw in the State of Michigan. It does not cut lumber from the log, but buys it in the rough from various mills on the Georgian Bay and at various other lake points, transports it by water to its mills at Saginaw, and there manufactures it

10 I. C. C. REP.

into various kinds of dressed and finished lumber. The product is shipped by rail to different destinations, largely in the east, one-half being sold east of Pittsburg. Extensive plants engaged in the same business as the complainant are located at Buffalo and Tonawanda, New York. These mills purchase their rough lumber in the same markets, transport it by water to their mills at a cost of about 25 cents per thousand feet more than the cost to the complainant, manufacture it into the same product, and sell that product in the same markets with the complainant.

The defendants are interstate carriers and transport the product of the complainant's mills from Saginaw and also from competing mills at Buffalo and Tonawanda to New York and to points on the New York & Long Branch Railroad in the state of New Jersey.

The rate on lumber, including the product of the complainant's mills from Saginaw to New York is 21 cents per 100 pounds and the rate from Buffalo 15 cents per 100 pounds. To points on the New York & Long Branch Railroad the rate from Saginaw is 5 cents above the New York rate, while the rate from Buffalo is but 2 cents above that rate. The complainant insists that the same arbitrary above New York should apply in case of both Buffalo and Saginaw, and that is the question presented for decision in this proceeding.

One cent per hundred pounds equals approximately 20 cents per thousand feet as applied to the lumber handled by the complainant. It will be seen, therefore, that in the matter of transportation the manufacturer at Buffalo has a considerable advantage over the manufacturer at Saginaw in the rate to New York, for while it costs the Buffalo mill 25 cents per thousand feet more from the point of origin to the point of manufacture it costs the Saginaw mill something over \$1.00 more per thousand from the point of manufacture to the point of consumption. When this difference in the cost of transportation is further increased by 3 cents per hundred pounds as it is to points on the New York & Long Branch Railroad the manufacturer at Saginaw finds it almost impossible to compete with Buffalo. The testimony in this case shows and we find that this adjustment of

10 I. C. C. REP.

rates has largely excluded Michigan dealers from the territory in question.

An examination of the tariffs shows that in case of all other commodities the rates to points on the New York & Long Branch Railroad from Michigan are 5 cents above the rate to New York and from Buffalo also 5 cents above the rate to New York. So far as this record shows and so far as we can ascertain, lumber is the only commodity on which the arbitrary is different. Careful examination of this record fails to disclose any legitimate reason for that difference at the present time.

No excuse can be alleged on the score of distance since Buffalo has apparently a somewhat less advantage over Saginaw in this respect to points on the New York & Long Branch Railroad than to New York. New England destinations take an arbitrary of 2 cents above the New York rate from both Saginaw and Buffalo. To Philadelphia the Saginaw rate is 2 cents less than to New York while the Buffalo rate is the same. There seems to be no reason, therefore, on the score of location for increasing the difference by 3 cents to these particular points; nor can we fairly assume that the relation to these few points is right, and wrong everywhere else.

The defendants set forth in their answer that the discrimination was due to water competition and undertook in some measure to justify that claim upon the hearing; but it is evident on the admitted facts that it can have no foundation. There is active water competition in the transportation of lumber between Buffalo and New York and this competition in consequence affects the rate from Buffalo to New York. There is no communication by water between Buffalo and points on the New York & Long Branch Railroad; lumber moving from Buffalo by boat for those stations would be taken to New York, there placed upon the cars and transported by rail to destination. In other words the effect of water competition is exhausted when the lumber reaches New York and can justify no wider difference in rate at these interior points than exists at New York itself.

It fairly appears from the testimony that the present relation in rates grew out of some condition which existed when the New York & Long Branch Railroad was operated as a separate prop-

erty. To-day it is jointly controlled by the Pennsylvania Railroad and the Central of New Jersey. The representative of the latter company said in substance that he could give no good reason for a continuance of the relation at the present time; none appears in this record and we find, therefore, that the discrimination is undue.

CONCLUSIONS.

Upon the foregoing findings of fact the complainant is entitled to an order requiring the defendants to cease and desist from maintaining the present relation of rates. The rate from Saginaw should exceed that from Buffalo by the same arbitrary above the rate to New York points. This discrimination can be corrected either by raising the rate from Buffalo or by lowering that from Saginaw and it is, therefore, possible that the effect of our conclusion may be to increase the rate on lumber to points upon the New York & Long Branch Railroad. This, however, seems to be no good reason why the above conclusion should not be reached. If the rate when adjusted is too high it should be reduced from both points.

No. 790.

THE LEHMAN-HIGGINSON GROCER COMPANY;
THE WICHITA WHOLESALE GROCERY COM-
PANY; THE AYLESBURY MERCANTILE COM-
PANY, and W. E. JETT and FRANK C. WOOD, Co-
Partners Doing Business under the Name and Style of
JETT & WOOD,

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY; THE CHICAGO, ROCK ISLAND &
PACIFIC RAILWAY COMPANY; THE ST. LOUIS
& SAN FRANCISCO RAILROAD COMPANY; THE
MISSOURI PACIFIC RAILWAY COMPANY; THE
ILLINOIS CENTRAL RAILROAD COMPANY;
THE ST. LOUIS, IRON MOUNTAIN & SOUTH-
ERN RAILWAY COMPANY; AND THE TEXAS &
PACIFIC RAILWAY COMPANY.

RYLEY-WILSON GROCER COMPANY and NAVE-Mc-
CORD MERCANTILE COMPANY, *Interveners.*

Decided January 17, 1905.

Complainants alleged that defendants, having in effect on sugar in car-loads from New Orleans, rates per hundred pounds which were 25 cents to Wichita and 20 cents to Kansas City and other Missouri River points, increased those rates to 47 cents to Wichita and 32 cents to Missouri River points, thereby increasing the differential as between Wichita and Kansas City from 5 cents to 15 cents per hundred pounds, and that the new rates were, as against Wichita, unjust and unreasonable in themselves and relatively; and it was further alleged that new advanced rates from other points of origin imposed the same differential as between Wichita and Kansas City, and that, as against Wichita, those rates were also unlawful. Wichita and Kansas City compete for the sale of sugar in common competitive

10 I. C. C. REP.

territory. The competitive conditions applying in the transportation of this traffic to Wichita and Kansas City are stated and found not to justify the 15-cent differential against Wichita, and the existing rates to Wichita are excessive. *Held:*

1. That the rate of 47 cents on sugar from New Orleans to Wichita is unreasonable.

2. That the present differential of 15 cents applied at Wichita above Kansas City on shipments of sugar from the Atlantic Seaboard and New Orleans subjects Wichita to undue discrimination; and such differential should not be more than 8 cents per 100 pounds.

3. That as to traffic passing through Wichita to Kansas City the rule laid down in *Johnston-Larimer D. Co. v. A., T. & S. F. Ry. Co.* 6 I. C. C. Rep. 586, forbidding any higher charge to Wichita than to Kansas City on shipments from Galveston, is, in the light of decisions of the United States Supreme Court, no longer applicable, and defendants operating lines through Wichita to Kansas City are not prohibited from charging a higher rate on sugar to Wichita than to Kansas City so long as the Wichita rate is reasonable.

A. E. Helm and *T. F. Garver* for complainants.

Robert Dunlap for A., T. & S. F. Ry. Co.

J. G. Egan for St. L. & S. F. R. R. Co.

W. T. Rankin for C., R. I. & P. Ry. Co.

Henry G. Herbel for Mo. Pac. Ry. Co., St. L. I. M. & S. Ry. Co., and Tex. & Pac. Ry. Co.

Ed. Baxter and *S. F. Andrews* for Ill. Cent. R. R. Co.

W. P. Trickett and *F. W. Maxwell* for Interveners.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, Commissioner:

On December 22, 1904, the Lehman-Higginson Grocer Company and four other firms engaged in the wholesale grocery business at Wichita, Kansas, filed with the Commission a complaint against the Atchison, Topeka & Santa Fe Railway Company and certain other railway companies alleging that the rates on sugar were at that time in carloads from New Orleans, Louisiana, to Wichita, Kansas, 25 cents per hundred pounds and to Kansas City and other Missouri River points 20 cents; that on January 1, 1905, the defendants proposed to put in effect rates from New Orleans, to Wichita of 47 cents per hundred pounds and to Kansas City of 32 cents per hundred 10 I. C. C. REP.

pounds; that this increased the difference in rates on this commodity from New Orleans to Kansas City as compared with Wichita from 5 cents per hundred pounds to 15 cents per hundred pounds, and that the proposed rates were unjust and unreasonable in themselves and relatively.

The petition further alleged that the defendants proposed to make advances on sugar from other points of origin, recognizing the same differential of 15 cents between Kansas City and Wichita; that this sugar in passing from New Orleans or from the Atlantic seaboard by ocean and rail via the Gulf ports would be transported by some of the defendants through Wichita en route to Kansas City and by others of the defendants to both Wichita and Kansas City at approximately the same cost; that the proposed rates would be unreasonable in themselves and that maintenance of a higher rate at Wichita was in violation of sections 3 and 4 of the Act to regulate commerce.

The petition also called attention to the case *Johnston-Larimer Dry Goods Company v. Atchison, Topeka & Santa Fe Ry. Co.*, decided by the Commission May 12, 1896, and reported in 6 I. C. C. Rep. 568, in which it was held that no higher rate should be charged at Wichita than was applied at the Missouri River on traffic from Galveston through Wichita.

The petition asked that the Commission request the attorney general to institute proceedings under the so-called Elkins Bill, approved February 19, 1903, to enjoin the defendants from maintaining the discrimination which would be worked against the complainants located at the city of Wichita.

The statute in question provides, "That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier, . . . is committing any discrimination forbidden by law" a proceeding may be begun in the circuit court. We were not altogether clear whether the discrimination set forth in the complaint was such a discrimination as that contemplated in the statute referred to, but assuming that it was, it seemed to us that we could hardly say without hearing the carriers that there was reasonable ground for belief that the relation in rates which it was proposed to establish on January 1, would create an unjust discrimination against the city of

10 I. C. C. REP.

Wichita and, therefore, against the complainants. It was, therefore, ordered that the petition be treated as a formal complaint, that the carriers be required to file answers forthwith and that the matter be set down for speedy hearing. In accordance with this order the defendants answered and a hearing was held at Chicago December 29 and 30, the various parties interested being allowed until January 10, for the filing of briefs. Jobbers at Kansas City and on the Missouri River were allowed to intervene and have been duly heard in the premises.

The questions presented, as we construe the record, are:

First. The reasonableness of the present rates to Wichita.

Second. The reasonableness of the 15-cent differential at Wichita above Kansas City.

Third. The lawfulness of higher rates to Wichita than are made to Kansas City by those lines which either transport traffic through Wichita or serve both Wichita and Kansas City.

While the petition did not ask the institution of a suit to restrain the proposed rates at Wichita upon the ground that they would be unreasonable, since no such suit could be brought under the statute invoked, it did allege the unreasonableness of those rates and that allegation has been traversed by the answers of the defendants. At the same time no testimony has been introduced with special reference to that point; the complainants are only interested in the reasonableness of these rates to the extent that this may be involved in securing a just relation of rates between Kansas City and Wichita, and we have only considered the inherent reasonableness of all these rates in that aspect.

The interest of these complainants is manifest. They are wholesale grocers at Wichita. In the jobbing of groceries, sugar is what is termed a "leader." Unless the jobber can sell his customers this commodity, he cannot ordinarily obtain their other business, and largely for this reason it is sold upon a very narrow margin. The difference in the freight rate to Wichita and Kansas City determines the relative price at which competing jobbers located at these two points can own their supplies of sugar. While the carriers are interested in the adjustment of

10 I. C. C. REP.

these rates, the jobber is even more vitally concerned and seems to have borne a leading part in this contest.

It may be instructive, before inquiring what rates have actually prevailed, to consider the general situation. The sugar consumed in the United States is mainly refined upon the Atlantic seaboard. Since 1900, sugar in the Official Classification has been, in carloads, 5th class, and the regular 5th class rate from New York to East St. Louis has been 35 cents per hundred pounds. The Mississippi River is a basing line, rates beyond being made by adding the full local to the rate up to the Mississippi. The carload class rate between East St. Louis and Kansas City on sugar has been 22 cents per hundred pounds and in theory, therefore, the Kansas City rate from New York has been 35 cents plus 22 cents, or 57 cents per hundred pounds.

The Missouri River forms a second basing line, rates beyond being again made by adding the full local rate to the rate up to the Missouri. Of late the carload rate on sugar from Kansas City to Wichita and corresponding interior jobbing towns has been 15 cents per hundred pounds. It was formerly much higher, but interior Kansas jobbers applied to the Railroad Commission of the State of Kansas, which put in effect some 12 years ago this 15-cent rate, and since then, in theory, the Wichita rate has been made by adding 15 cents to the Kansas City rate, making the total rate from New York 72 cents.

Sugar from New York may reach both Kansas City and Wichita by other routes than the all-rail route over which the above rates apply. There is what is known as the lake-and-rail route, via rail from New York to Buffalo, or some eastern port on the Great Lakes, from there by water to some western port, and thence again by rail to destination. It is also transported by sea and rail, going from New York to Norfolk or some other east Atlantic port and from thence by rail to destination. By all these routes the sugar passes through the Missouri River en route for Wichita, and there is no apparent reason why the additional cost of transportation from the Missouri River to Wichita should differ, whether the traffic reaches the Missouri River all-rail, or by lake and rail, or by sea and

rail. Shippers ordinarily prefer the all-rail route at the same price and in order to divide the traffic between these three possible routes, it is necessary to accord the part water routes a differential below the all-rail routes. That differential is 4 cents in case of ocean and rail via the Atlantic ports in both carloads and less than carloads; it is 5 cents in carloads, and 4 cents in less than carloads via lake and rail, the same differential applying both at the Missouri River and at Wichita.

It will be seen that under this scheme of rate-making the wholesaler at a basing point enjoys over his competitor at another basing point whatever advantage can be derived from the difference between the carload and the less than carload rate. The carload rate from East St. Louis to Kansas City, as already stated, has been 22 cents, the less than carload rate 27 cents. The Kansas City jobber and the St. Louis jobber own their sugar at the same price at St. Louis. The distribution of this sugar is necessarily under the less than carload rate. Now the Kansas City jobber transports his sugar from St. Louis to Kansas City for 22 cents while the St. Louis jobber pays the less than carload rate of 27 cents. It follows that the Kansas City wholesaler can send sugar back upon equal terms with his competitor at St. Louis into such territory as can be reached by a less than carload rate of 5 cents and no farther. The carload rate from Kansas City to Wichita has been 15 cents, the less than carload rate 20 cents, which permits the jobber at Wichita to operate as against the jobber at Kansas City only so far to the east as a less than carload rate of 5 cents will reach. It may be stated here that on September 25, 1904, the less than carload rate from Kansas City was increased to 25 cents, thereby adding to the territory into which the Wichita wholesaler can come towards the east.

Kansas City jobbers urge that the same method of constructing rates which applies against them in favor of St. Louis ought to apply against Wichita in favor of Kansas City, and if the conditions were exactly those above assumed, it is difficult to see how there could be any escape from this conclusion. If sugar did originate exclusively at New York and if the all-rail rates on sugar to East St. Louis and Kansas City were 10 I. C. C. REP.—30.

made by taking the sum of the locals, why should not, upon the same principle, the rate be made to Wichita by adding the full carload local to Wichita? St. Louis enjoys an advantage in distance over Kansas City, which is recognized. Kansas City enjoys a similar advantage in distance over Wichita, which should in the same way be recognized. This Commission has frequently questioned the propriety of establishing a base line for the purpose of building up rates in this manner, but that custom has been universal in this territory. Commercial conditions have adapted themselves to it and we should hardly feel warranted in disturbing those conditions without further consideration than can be given the matter here. The fact that there is competition by different routes from New York via lake and rail, and via ocean and rail through the Atlantic ports does not apparently alter the situation, since the same competition exists at the Missouri River, and its effect is exhausted when the Missouri River is reached.

But the conditions above assumed do not in fact exist.

First. There is still another route by which this traffic may pass from the Atlantic seaboard to the Missouri River, namely, by ocean to New Orleans or Galveston and thence by rail. When the traffic reaches New Orleans it is about equally distant from Kansas City and Wichita; so that by this route Kansas City enjoys no advantage in point of distance. It does enjoy this advantage: Water competition determines the rate from New Orleans to Memphis and St. Louis and this tends to reduce the rate to Kansas City as compared with Wichita. On the other hand, when the traffic comes via Galveston, the rail haul to Wichita is in all cases considerably less than to Kansas City. Two lines, the Atchison, Topeka & Santa Fe and the Rock Island would transport it through Wichita, or that in substance, and the distance would be about 225 miles shorter. Here, therefore, is a competitive factor which tends to break down the full differential at Wichita.

Second. Sugar consumed in the United States does not all originate on the Atlantic seaboard. A very considerable quantity is grown and refined in the Southern States, and New Orleans may be taken as the principal point of this production.

10 I. C. C. REP.

Testimony in this case showed that 75 per cent of the sugar brought into Kansas City originated at New Orleans. The Mississippi River fixes the rate on this sugar to Memphis and East St. Louis, but the rail distance to Kansas City via Memphis is considerably less than via East St. Louis, and this tends to reduce the cost of transportation and the rate via this route as compared with the route to St. Louis and from thence to Kansas City. In other words, the tendency is to reduce the difference in rates between Kansas City and East St. Louis below the full local of 22 cents. In like manner the distance from New Orleans by rail to Kansas City and to Wichita is approximately the same and the cost of transporting sugar to these two points is substantially the same. Kansas City still has the benefit of Mississippi River competition as far north as Memphis, but the effect of this is comparatively slight. The tendency of this situation is to produce substantially the same rate at Wichita and Kansas City, or, in other words, to break down the maintenance of the full differential between those points. While Kansas City has an advantage of location with respect to sugar refined upon the Atlantic seaboard, it has no such advantage with respect to that grown and refined on the Gulf of Mexico.

Third. Sugar is also refined in large quantities upon the Pacific coast and brought from there by rail to the Missouri River, passing through Wichita and corresponding interior Kansas points on its way. The raw sugar is mainly produced in the Hawaiian Islands, from which it may be taken either to the Pacific coast or to the Atlantic seaboard for refining. The expense of reaching the Missouri River with the finished product is substantially the same by either route. It will be noticed that this sugar passes through these interior Kansas points, so that upon the score of distance they have an advantage over Kansas City.

Fourth. Large quantities of beet sugar are produced in Utah and Colorado, and this sugar at certain seasons of the year is handled both at Wichita and Kansas City. With respect to this, Wichita enjoys an advantage in distance over the Missouri River.

It will be seen, therefore, that the problem is an extremely

10 I. C. C. REP.

complex one, which admits of no exact solution. The differential between Kansas City and Wichita cannot be settled by reference to rates from New York alone. It ought to be the fair resultant of all the competitive conditions which have been detailed. If we turn from the theoretical consideration of the situation to the rates themselves, we shall find that such has been the exact result under the force of actual competition.

We have examined these rates in detail since January 1, 1900, and that period is referred to unless otherwise specified. We have sought no information prior to the above period except such as is derived from the oral testimony in this case.

The uniform rate from New York to East St. Louis by the all-rail route has been 35 cents. The all-rail rate from New Orleans to St. Louis was 20 cents until August 9, 1902, since when it has been 15 cents. So far as appears these rates have been maintained and no question is made as to their propriety.

We have already seen that the carload rate from St. Louis to Kansas City is 22 cents and that the Kansas City rate would be made ordinarily by adding 22 cents to 35 cents, making a through rate of 57 cents. There appears to have been an effort to maintain this figure; without much success however. The differential between St. Louis and Kansas City has fluctuated during this period from 22 cents to 5 cents; a fair average of the published tariff being from 12 to 15 cents. Mr. Lincoln testified that during the last ten years the average actual differential between these points had been approximately 12 cents. The present published rate from New York to Kansas City is 47 cents. This is a through published rate and we have no information as to the manner in which it divides at East St. Louis. It will be noticed that it is 12 cents above the rate to that point.

The rate from New Orleans to Kansas City has fluctuated from 37 to 20 cents, but the 37-cent rate was only in effect for a few months during the entire period. A fair average would be not far from 27 cents. The present rate is 32 cents, which is distinctly above the average rate for the last five years. Nevertheless, we are not disposed in this case to question the reasonableness of that tariff. The distance is approximately

10 I. C. C. REP.

900 miles. The class rate under which this traffic would move is 38 cents and without expressing any opinion which would preclude us from a further examination of this question, we are disposed to hold that 32 cents is not unreasonable.

The present rate from New Orleans to Wichita is 47 cents. We think this is too high. In the last five years no higher rate has ever been published, and this rate has only been maintained in effect for a few weeks. The rate in effect for a considerable portion of the past year has been 25 cents, and the general average for the five years would not be above 32 cents. The cost of transportation is no greater from New Orleans to Wichita than from New Orleans to Kansas City. It is true that competition by the Mississippi River may, to some extent, influence the Kansas City rate. We think it is also true, as stated by Mr. Lincoln, that there are conditions at Kansas City which might properly entitle that locality to a lower rate from New Orleans even though the cost of service were the same. This Commission has often held that carriers should not by their tariffs create artificial conditions, but they should recognize natural advantages. Kansas City has, in our opinion, certain natural advantages which entitle it to a somewhat better rate from New Orleans on sugar than prevails at Wichita, but we think the present difference is too wide and that the present rate of 47 cents is unreasonably high.

The differential now in effect between Wichita and Kansas City is the full local carload rate of 15 cents. As above suggested we are inclined to hold that this is too much. It has been already observed that the same competitive conditions which tend to reduce the differential between East St. Louis and Kansas City, have the like tendency between Kansas City and Wichita. Those conditions have borne down the differential between the Rivers from 22 to 12 cents. Mr. Lincoln testified that in the past, under the operation of these competitive conditions, the actual differential between Wichita and Kansas City had been approximately 8 cents. We think that these competitive forces should be recognized in naming the differential between Kansas City and Wichita in the same manner that they have been in naming that between East St.

10 I. C. C. REP.

Louis and Kansas City. It is impossible to fix this upon any exact basis, but our judgment is that it ought not to exceed 8 cents; certainly not if the same differential is to obtain on rates from New Orleans to Kansas City and Wichita as obtains in case of those from the Atlantic seaboard.

In coming to this conclusion, we have carefully examined the combination at which various points in Kansas can be reached through Kansas City and Wichita upon the basis of the local less than carload rates as they now exist, and we are satisfied that no great injustice will be done either party in the distribution of business. This is not, however, as we have endeavored to indicate, the proper basis of decision. It is not the function of the carriers in establishing their rates, nor of the Commission in revising them, to apportion territory among wholesale dealers, but rather, to give each locality the benefit of whatever advantage it may possess.

The present sea-and-rail rate from New York to the Missouri River is 42 cents per hundred pounds; to Wichita 57 cents. We have already found that the Missouri River rate is fixed by the all-rail rate from the Atlantic seaboard. The remaining question is, therefore, upon the reasonableness of the 57-cent rate to Wichita. The testimony shows that this rate divides 35 per cent to the water and 65 per cent to the rail. On a basis of 57 cents, the rail carrier from Galveston to Wichita would receive 37 cents; on a basis of 50 cents, 32½ cents, the distance being about 700 miles. The total through class rate under which sugar would move from New York to Wichita by this route, if there were no commodity rate, is 89 cents. If this rate were to be considered as an entirely independent proposition, it could hardly be held unreasonably high. Few rates can be so treated and we are inclined to hold that this one must be examined in view of the surrounding circumstances, and that when the conditions pertaining to the movement of this particular traffic are considered, especially when we take into account the actual rates which its highly competitive character has produced in the past the present rate should be held excessive. When the Missouri River rate is established upon a fair and normal basis, as it seems to

be to-day, we think the sea-and-rail rate to Wichita ought not to exceed that at the Missouri River by more than 8 cents, and we hold that the present rate of 57 cents from New York to Wichita via the Gulf ports is unreasonably high in comparison with the present rate of 42 cents to the Missouri River.

Our opinion is that the all-rail rate from New York to Kansas City may properly be 47 cents and the rate from New Orleans to Kansas City 32 cents, but that rates from both these points to Wichita should not exceed those to Kansas City by more than 8 cents. This adjustment would allow the carriers distinctly more than they have received on the average for the last five years on this business from New Orleans, probably about the average from the Atlantic seaboard. While, however, the general effect might be a slight advance over the past the rates suggested can hardly be regarded as unreasonably high and we feel that it is in the interest of the public and the railways alike that these transportation charges should be uniform and stable rather than the subject of the violent fluctuations and resultant discriminations of the past.

CONCLUSIONS.

It has been found that the rate from New Orleans to Wichita of 47 cents per hundred pounds is unreasonable *per se*, and the defendants should be ordered to cease and desist from charging that rate.

It has been further found that the present differential of 15 cents per hundred pounds which is applied at Wichita above the Kansas City rate on shipments of sugar both from the Atlantic seaboard and from New Orleans is an undue discrimination against Wichita in violation of the third section. Those defendants which engage in transporting sugar from the Atlantic seaboard to both Kansas City and Wichita and those carriers which transport sugar from New Orleans to both Kansas City and Wichita should therefore be directed to cease and desist from maintaining the present rates based on a differential of 15 cents. Those defendants which operate through Wichita should also be directed to cease and desist from charging the present higher rates to Wichita than to Kansas City.

Some of the defendants stated in their answers and others stated upon the hearing that they would prefer to cancel their rates to the Missouri River rather than reduce the rate to Wichita. If they maintain no rates to the Missouri River, they do not, of course, discriminate against that point by maintaining a rate of 57 cents at Wichita.

In our opinion, as already stated, the rates of 47 cents from New York and of 32 cents from New Orleans; to Kansas City may properly be maintained, but the rate to Wichita should not exceed these by more than 8 cents. If the rates involved were adjusted on this basis, we do not think the carriers would violate either the third or fourth section by imposing higher rates at Wichita than at Kansas City. It is true that this Commission held in *Johnston-Larimer Dry-Goods Company v. Atchison, Topeka & Santa Fe Railway Company* and others, 6 I. C. C. Rep. 586, that no higher rate should be imposed at Wichita than at Kansas City upon traffic from Galveston, but that case was decided by the Commission before the Supreme Court had placed its interpretation upon the third and fourth sections, and in the light of that interpretation the previous holding of the Commission cannot be followed. That court held in *East Tennessee, Virginia & Georgia Railway Company v. Interstate Commerce Commission*, 181 U. S. 1, that where the rate at Nashville was fixed, carriers reaching Nashville through Chattanooga did not violate either the third or fourth section by imposing higher rates at Chattanooga than they charged at Nashville. In the case before us, the rate to Kansas City is fixed and, therefore, the defendants are not prohibited from charging a higher rate to Wichita than they maintain to Kansas City so long as the former rate is reasonable. While the original conclusion of the Commission was otherwise, it is our duty to now revise that conclusion in accordance with the decisions of the Supreme Court.

No. 789.

IN THE MATTER OF ALLEGED UNLAWFUL RATES
AND PRACTICES IN THE TRANSPORTATION
OF COAL AND MINE SUPPLIES BY THE ATCHI-
SON, TOPEKA AND SANTA FE RAILWAY COM-
PANY.

Decided February 1, 1905.

1. The act to regulate commerce, which requires carriers to publish and adhere to their tariffs, has been grossly and continuously violated by the Atchison, Topeka and Santa Fe Railway Company during the last five years in the following respects: It published rates on interstate shipments of coal from mines in Colorado and New Mexico which, under the tariffs, applied only to the transportation thereof, but which for the Colorado Fuel and Iron Company were made by the railway company to include the price of the coal, and such price was paid to the fuel and iron company by the railway company. While giving rebates to the fuel and iron company from such tariff rates, it charged the full tariff rates on interstate shipments of coal by other shippers in not only the general coal region involved, but in the same coal field. This practice of the railway company resulted in closing markets for coal to shippers competing with the Colorado Fuel and Iron Company.
2. The act of February 19, 1903 (the so-called Elkins law), which prohibits carriers from transporting traffic until a tariff has been published, requires observance of the tariff, provides a penalty for each violation of not less than \$1,000 nor more than \$20,000, and applies both to the carrier and the party receiving the concession, has, respecting the transportation involved in this proceeding, been systematically and continuously violated by the Atchison, Topeka and Santa Fe Railway Company and the Colorado Fuel and Iron Company from the day of its passage down to November 27, 1904, when the tariffs upon which this coal moved were reduced in all cases \$1.15; and this notwithstanding the Atchison, Topeka and Santa Fe Railway Company has, in a suit begun in the United States circuit court at the instance and request of this Commission, been under injunction since March 25, 1902, to observe in all respects its published schedules of rates.

10 I. C. C. REP.

J. T. Marchand for the Commission.

Robert W. Dunlap for the Atchison, Topeka and Santa Fe Railway Company.

Neill B. Field for the Caledonian Coal Company.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, Commissioner:

The matter under investigation is the alleged departure from its published rates by the Atchison, Topeka and Santa Fe Railway system in favor of the Colorado Fuel and Iron Company in the transportation of coal and mine supplies. The attention of the Commission was first directed to these alleged infractions of the act to regulate commerce by the claim of the Caledonian Coal Company that the Santa Fe Railway Company was discriminating against it in favor of the Colorado Fuel and Iron Company, and while the effect of the alleged unlawful acts is not confined to the Caledonian Company, the situation can perhaps be best stated by some reference to the operations of that company.

The Caledonian Company was organized in 1888 for the purpose of operating a coal mine located at Gallup, N. Mex., which is a station upon the Santa Fe system 158 miles west of Albuquerque. There were at that time several mines at Gallup producing the same quality of coal but operated by different interests. This coal is of a lignite character, free burning, and especially adapted to domestic consumption. The coal of the Caledonian Company, as it comes from the mine, is passed over a screen, which separates the larger sizes from the smaller, the finer grades being still further screened, so as to produce what is known as engine coal and slack. The large sizes are marketed for domestic consumption, the engine coal being only fit for steam purposes.

From the time of the organization of the Caledonian Company down to 1899 a large portion of this engine coal seems to have been taken by what is now the Santa Fe Railroad System for use in its locomotives. The use of this coal for that purpose seems to have extended as far east as Albuquerque and to

10 I. C. C. REP.

Mojave on the west, and all the mines at Gallup appear to have shared in furnishing the Santa Fe with this coal. When the contract of the Santa Fe with the Caledonian Company expired, in 1898 or 1899, the parties could not agree upon the price, and the contract was not renewed, although the Santa Fe continued to obtain more or less coal from that company until the year 1901.

Sometime previous to the expiration of this contract the other mines at Gallup were consolidated under one company, known as the Crescent Coal Company, and pending negotiations for a renewal of the contract with the Santa Fe for the furnishing of engine coal the Crescent Company was purchased by the American Fuel Company. This latter company was composed of Mr. Osgood, then the head of the Colorado Fuel and Iron Company, and his friends, and it appears to have turned over to the Colorado Fuel and Iron Company, from the first, the operation of these mines. The testimony does not show definitely how long they were operated by the Colorado Company, but apparently for some two or three years. Mr. Bowie, the manager of the Caledonian Company, testified that at the time of the purchase of the Crescent Company he was asked by the agent of the Colorado Fuel and Iron Company to name a price on his property, but declined to do so.

Very soon after the Colorado Company took possession of these mines the Santa Fe System stopped receiving engine coal from the Caledonian Company. The Caledonian Company also had a contract with the Santa Fe, Prescott and Phoenix Railway Company, whose line of railroad extends from Ash Fork to Florence, Ariz., to supply it with engine coal to the amount of 1,500 to 2,000 tons per month. This contract was terminated in 1903, and the manager of that road in electing to terminate the contract, as he might do at any time by its terms, stated to the Caledonian Company that he took this action, not because the coal was of an unsatisfactory kind or not properly supplied, but by the direction of the purchasing agent of the Atchison System. It was said that the Atchison Company at that time owned a controlling interest in the Santa Fe, Prescott and Phoenix Company.

10 I. C. C. REP.

To successfully operate its mine the Caledonian Company must have some avenue for the disposal of its engine coal, and when the patronage of the Santa Fe Company was withdrawn it became necessary for it to seek some other customer. There was but slight demand for fuel coal upon the line of the Santa Fe west of Gallup, and it was impossible to ship this coal to points much north of Albuquerque for steam use, since it was there met by other coal from the north, of superior quality, which could be furnished by a haul of approximately the same distance. The only fuel market was to the south of Albuquerque along the line of the Santa Fe from Albuquerque to El Paso and through the gateways of El Paso and Deming.

Considerable quantities of steam coal are used in El Paso for various industries located there and in that vicinity, and the Southern Pacific and the Mexican Central railroads both receive coal for their own consumption at that point. The El Paso and Southwestern and the Southern Pacific both receive coal for railroad consumption at Deming, N. Mex., and several large smelting plants are located at points in New Mexico, Arizona, and Mexico which are reached by these railroads through the Deming gateway. Steam coal for consumption in this region is obtainable from what is known as the Trinidad or southern Colorado district and is largely supplied by the mines in that source. The mines embraced in the original Trinidad district were all located north of the Raton Pass, but latterly mines of the same quality have been opened in New Mexico, south of this pass.

There is also the Dawson field, which at the present time reaches El Paso over the Rock Island System and which furnishes a quality of coal similar to that produced by the Trinidad district. Formerly large quantities of both domestic and steam coal were obtained from the Cerrillos district, on the Santa Fe 50 miles north of Albuquerque, but the supply at that point is nearly exhausted, and those mines are no longer an important factor in this situation. There is also what is known as the Carthage field, which reaches the Santa Fe line at San Antonio, N. Mex., about 150 miles north of El Paso. This coal is of good quality, apparently as good as the Trinidad coal, but some-

what more expensive to mine, and at the present time must be hauled several miles by wagon. The production from this source has been comparatively small.

The Gallup coal is inferior for steam purposes to the Trinidad, the Dawson, and the Carthage coal. The witnesses did not agree as to the comparative merits of the Gallup and other coals, some stating that the Gallup coal was practically worthless for a steam fuel, while others testified that it was of substantially the same grade as other steam coals. The manager of the Caledonian Company admitted that it was not equal in heating properties with the other coals, but claimed that it was readily salable for that purpose at a somewhat less price.

When the Caledonian Company, as above stated, attempted to find a market for its steam sizes, it ascertained, apparently, that coal both from the Trinidad region and from the mines at Gallup was being supplied at a price which just about equaled the freight rate alone from the point of production to destination. This information was first received from a mining company at Las Cruces, a point on the Santa Fe System south of Albuquerque. The proprietors of that mine stated in their negotiations with the Caledonian Company that they were paying \$5.65 per ton for Gallup lump coal. The published freight rate at that time was \$5.65 from Gallup to Las Cruces, and lump coal was selling at from \$1.60 to \$2.50 per ton at the mine. Thinking there must be some mistake in the rate, the Caledonian Company applied to the station agent of the Santa Fe at Gallup, asking him to verify the rate. He did so, and informed that company that the rate was in fact \$5.65 per ton. This was in March, 1900.

In April of the same year the Caledonian Company received from the New Mexico Light, Heat, and Power Company, of Silver City, N. Mex., a request for quotations on nut coal, that being the smaller size heretofore referred to as engine coal. This company had been using run-of-mine coal from Gallup, and imagined that a saving might be made by purchasing the smaller and cheaper size. The Caledonian Company named a price, and received instructions to ship a carload of the coal. The letter giving the order stated that Gallup lump coal was
10 I. C. C. REP.

then being delivered at Silver City for \$5.75 per ton, and the manager of the Caledonian Company ascertained upon application to the agent of the Santa Fe at Gallup that the freight rate was \$5.90 per ton. Notwithstanding this information, shipment was made by the Caledonian Company, and the New Mexico Company at Silver City paid in freight \$5.90. At about the same time it received a carload of coal from Gallup purchased from the Colorado Fuel and Iron Company, for which it paid \$5.75 per ton delivered at Silver City. No question was made but that the quality of the coal taken from the Caledonian mine was the same as that of the coal mined by the Colorado Fuel and Iron Company at Gallup.

Thereupon Mr. Bowie, the manager of the Caledonian Company, addressed to Mr. Chambers, the general freight agent of the Santa Fe Company, having jurisdiction over the territory in question, a letter stating that his competitor, the Colorado Fuel and Iron Company, was selling coal, mined at Gallup, in Silver City for less than the freight rate from Gallup to Silver City; that he was producing the same kind of coal, which he desired to sell in competition with the Colorado Company, but which he manifestly could not unless both parties were required to pay the same freight rate. To this Mr. Chambers made reply in substance that Gallup mines had never enjoyed the market south of Albuquerque; that this territory had been supplied from the Cerrillos district; that this rate had been given the Colorado Fuel and Iron Company because it was not able to fill all its orders from Cerrillos, and that the Caledonian Company ought not to complain because it was unable to ship from Gallup to Silver City.

In replying to this letter of Mr. Chambers, the manager of the Caledonian Company, under date of May 1, 1900, said:

"We have yours of the 27th ultimo (file No. C 327), regarding rate on coal from Gallup to points south of Albuquerque. We understand that your rates are so adjusted that the territory south of Albuquerque has been supplied from the Cerrillos mines. We have not questioned the justice or propriety of that arrangement. So long as

10 I. C. C. REP.

the territory south of Albuquerque was supplied from the Cerrillos mines no Gallup shipper had any just cause for complaint on account of the freight rate from Cerrillos being less than that from Gallup, because the distance from Cerrillos was less and the natural conditions gave the Cerrillos mines the advantage over the Gallup region; but when you give one Gallup shipper the Cerrillos freight rate from Gallup to points south of Albuquerque and charge all other Gallup shippers a greater freight rate you are discriminating in favor of that one shipper as against all others and giving the favored company a monopoly on the coal business in the region referred to."

To this letter Mr. Bowie received no reply, and since the matter was of vital importance to him he went to Los Angeles for a personal conference with Mr. Chambers, but could obtain no satisfaction and no assurance that there would be a change in the future.

In June, 1900, for the purpose of definitely ascertaining whether this practice still continued, the Caledonian Company made shipment of a second car of nut coal to the New Mexico Light, Heat, and Power Company, at Silver City. That company was receiving Gallup lump coal from the Colorado Fuel and Iron Company for \$5.75 per ton f. o. b. Silver City. Nut coal is of less value per ton than mine run, and the Caledonian Company was obliged, therefore, in order to secure the order for this carload, to guarantee that it should not cost the New Mexico Company at Silver City more than \$5 per ton. In fact the freight rate paid by the Caledonian Company upon that carload was \$5.75 per ton. It will be seen, therefore, that of these two carloads the Caledonian Company lost its coal and 15 cents per ton on the first, on the second its coal and 75 cents per ton. Subsequently it was offered a refund of 15 cents per ton on the first shipment, for the reason that the rate charged was 15 cents too high, but it declined to accept this offer, or at least had never received the money.

The manager of the New Mexico Light, Heat, and Power Company testified as to the price which he had paid the Colorado I. C. C. REP.

rado Fuel and Iron Company for Gallup coal at that time, and the expense bills were introduced showing the freight paid on the various shipments.

The foregoing transactions were in 1900. Mr. Bowie, the manager of the Caledonian Company, testified that from then on he made continual efforts to find a new market for his steam coal; that while he disposed of more or less of it to small consumers, he was unable to supply any large consumer, owing to the competition of the Colorado Fuel and Iron Company, and that he for this reason was forced to contract his business, doing less and less each year, until his mining operations had come to a practical standstill. Both Gallup and Silver City are in New Mexico. If, therefore, the act to regulate commerce does not apply to traffic entirely within a Territory of the United States, these particular shipments are not within the jurisdiction of that act. Mr. Bowie testified, however, that he had made many shipments to El Paso, Tex., from Gallup upon which he paid the published rate, and that he found the same competitive conditions at El Paso and at points in Arizona and Mexico which existed at Silver City.

Mr. Bowie was not the only mine operator in New Mexico who found it difficult to dispose of his product in competition with the Colorado Fuel and Iron Company. Among others, Mr. Hilton, who operated at Carthage, experienced the same difficulty. One Weckerle, a coal dealer at El Paso, handled coal for Mr. Hilton and knew the difficulty under which he labored. He had also attempted to sell coal at one time for the Caledonian Company. This person in the fall of 1902 took from the office of the Santa Fe at El Paso a circular in reference to coal rates which was offered in testimony. Counsel for the Atchison System vigorously insisted that Mr. Weckerle had stolen this paper, while counsel representing the Caledonian Company urged with equal vigor that the statute gave this coal shipper a right to the information which the circular contained; that the piece of paper on which it was written was of no value, and that the witness had, therefore, been guilty of no delinquency in obtaining that to which he was by law entitled. The moral quality of the transaction seems to be of little conse-

quence as bearing upon this investigation. No question was made as to the authenticity of the document, and it was accordingly admitted in evidence.

This circular was headed as follows:

“This publication is for the information of employees only, and copies must not be given to the public.”

It was in the nature of a price list, stating that coal originating at certain points would be delivered at certain other points when consigned to certain specified industries or individuals at a price named, and this price was in some instances no greater than the published tariff rate from the point of origin to the point of destination. It bore the name of Mr. Biddle, the freight traffic manager of the Santa Fe System, and was issued by the agent of that company at Topeka, Kans. Mr. Biddle was inquired of in reference to this circular and asked to produce other similar documents in continuation or amendment of which this paper on its face purported to have been issued.

Some of these papers were produced by Mr. Biddle at a subsequent hearing, who stated that he was unable to find others in the limited time at his disposal. Since the documents which were produced, together with the testimony of Mr. Biddle and the other testimony already taken in the case, seemed to leave no doubt as to what had actually occurred, the Commission did not require further search on his part. It does not seem necessary to give in detail the contents of these papers or to recite at length the testimony. From the evidence, the following general facts appear:

1. The Santa Fe Company acted as agent for the Colorado Fuel and Iron Company in collecting from its customers the price of the coal itself along with the freight rate. Mr. Biddle testified that his company did the same thing for other coal companies, and the evidence showed that in one instance, at least, this was done for the Victor Fuel Company.

In pursuance of this arrangement, the Santa Fe Company issued instructions to its agents to bill coal from certain points,
10 I. C. C. REP.—31.

at which the Colorado Fuel and Iron Company operated, to various stations upon its system at figures to be furnished by the Colorado Fuel and Iron Company which would include the price of the coal, but which should not in any case be less than the rates shown in regular tariffs. The practice under these instructions seems to have been to embrace the price of the coal and the freight rate in a single item, which appeared on the expense bill as freight, and we think this was the fair interpretation of the circular. In the instance referred to, upon the hearing in which the Santa Fe acted as collecting agent for the Victor Fuel Company, the price of the coal and the rate of freight were kept entirely separate, the price of the coal being treated in the nature of an advance charge.

2. If the Colorado Fuel and Iron Company had in all cases paid the published tariff rate which was exacted from other shippers, the fact that the price of the coal and the freight were included in a single item would have worked no practical advantage to that company so far as we can see. Neither, apparently, would there have been any reason for this arrangement if the purpose of the parties had been honest. If, however, there existed upon the part of the Santa Fe Company an intent to charge the Colorado Fuel and Iron Company less for the transportation of its coal than the published rate, it is evident that this method of billing would afford a ready means for concealing the transaction. In point of fact, during the entire period covered by this investigation the Santa Fe Company did transport coal for the Colorado Fuel and Iron Company for less than its open tariff rates, and these concessions amounted in many cases to the price of the coal itself.

This investigation extended back for a period of about five years. Previous to July 9, 1899, the tariff rate on soft coal from the Trinidad district to Deming had been \$5.50 per ton, but on July 9 this rate was reduced to \$5 per ton, at which figure it continued until June 16, 1902. On this date the rate was again reduced to \$4 per ton, so continuing until July 25, 1904, when it was again reduced to \$3.45 per ton. November 29, 1903, certain proportional rates were named when the traffic was destined to points beyond Deming, but until that date

the only tariff available to or through Deming was the strictly local tariff as above stated.

So far as the records of this office disclose, no joint rate was filed by the Santa Fe applicable on coal from the Trinidad district through Deming until June 24, 1902, when joint rates were named to Bisbee, Ariz., and Naco, Ariz. These rates were withdrawn on September 7, following, and no joint rates were in effect until May 24, 1903, when joint tariffs were filed to Bisbee, Globe, and Clifton, Ariz., and Cananea, Mexico. Since that date joint tariffs to these points have been continuously in effect. It will be seen, therefore, that except for about two months in the summer of 1902 the only tariff from the Colorado district to Deming or through Deming was the local tariff of \$5 from July 9, 1899, to July 16, 1902, and \$4 from July 16, 1902, to May 24, 1903. Now, when the published rate, and the only published rate, from the Trinidad district to Deming was \$5 per ton the Santa Fe Company habitually transported coal for the Colorado Fuel and Iron Company for \$3.75 per ton. It collected as freight \$5 per ton and of this paid over to the Colorado Company \$1.25 per ton. When the published rate was reduced to \$4 per ton, it charged the Colorado Fuel and Iron Company \$2.90 per ton, collecting \$4 as freight and paying over to the Colorado Company \$1.10 per ton.

It did not clearly appear what was done under the joint tariff to Bisbee and Naco, which was in effect from June 24, 1902, to September 7, 1902, but it did appear that under the joint tariff filed May 24, 1903, and continued in effect until November 27, 1904, the carriers who were parties to that tariff allowed the Colorado Fuel and Iron Company a concession upon all coal transported under those joint rates of \$1.15 per ton. We were furnished with a copy of the division sheet applicable to this tariff. The through rate to Cananea, Mexico, for example, was \$7.63. Of this, according to the division sheet, the Santa Fe received \$4.05 for its service up to Deming, the lines beyond receiving \$3.58 for their proportion. The rate named to Bisbee, Ariz., was \$6.32, of which the Santa Fe received \$4.05 and the El Paso and Southwestern \$2.27. Mr. Biddle testified that of the \$4.05 received by the Santa Fe \$1.15 was in all cases paid

10 I. C. C. REP.

to the Colorado Fuel and Iron Company, and that this was done with the full knowledge of the El Paso and Southwestern. Indeed, he stated that the arrangement was made with that company. It will be seen, therefore, that these railroads collected the published tariff rate from the Trinidad district to destination, and paid back to the Colorado Fuel and Iron Company \$1.15 per ton of the amount so collected.

3. Some suggestion has been made that these payments to the Colorado Fuel and Iron Company by the Santa Fe were not in the nature of rebates, but simply payment for the price of its coal; that the published tariffs in reality included the costs of the coal, but inadvertently omitted to state that fact. This record conclusively shows the contrary.

In the first place, the tariff filed with the Interstate Commerce Commission was issued by the same person, from the same office, and frequently at about the same time with the circular intended for the use of employees only. The published tariff stated the rate in dollars and cents per ton of 2,000 pounds and made no reference to the price of the coal. The secret circular expressly stated that the rate named included the price of the coal. It is incredible that under these circumstances all mention of this fact should have been omitted from the public tariff and expressly inserted in the secret tariff through any inadvertency or inattention.

But what conclusively answers this claim is the fact that the published coal tariffs of the Santa Fe Company applicable to this entire region did not include the price of the coal as practically interpreted by it.

Other shippers paid the tariff rate, which was retained *in toto* by the Santa Fe. When Mr. Bowie was corresponding with the officials of that railroad, endeavoring to obtain a rate which would permit him to do business in competition with the Colorado Fuel and Iron Company, no suggestion was made to him that his rate in fact included the price of his coal, and that the railway company would pay back to him that amount. When he traveled from Gallup to Los Angeles in the hope that a personal interview might bring him relief, he received no sugges-

tion of this sort from Mr. Chambers. Mr. Hilton paid the published rate from the Carthage field.

We know from another complaint heard at the same time with this investigation that other shippers from San Antonio were compelled to go out of business at that point because the published rate was advanced and collected in full. Mr. Biddle himself testified that no departure from the open tariff was accorded any other shipper in this vicinity except the Colorado Fuel and Iron Company, and we think it fairly appears in this case that that company itself on certain shipments paid the full tariff rate. The rebate was allowed only on coal delivered to certain specified persons or industries, and the amount of the rebate depended upon the person or industry. It appeared that the Colorado Fuel and Iron Company sold Phelps, Dodge & Co., for its smelters, coal f. o. b. Deming for \$4, while it was receiving from certain other consumers \$4.60.

4. It was said that these rebates in favor of the Colorado Fuel and Iron Company worked no discrimination, for the reason that there was no other shipper, and consequently no actual preference. The Santa Fe Company published its rates, and thereby said to the public in general that whoever desired to transport coal between these points must do so upon those terms. These rates of freight were actually insisted upon in the case of small consumers, apparently, but whenever it seemed desirable, for the purpose of securing a particular contract, to shade the price a special arrangement was made between the Santa Fe and the Colorado Fuel and Iron Company, by which the Santa Fe agreed to transport the coal required to fill that contract for less than its published rate. Since the greater part of the business of that coal company was the filling of these large contracts, the rebate was applied to the greater part of its total shipments.

It needs but the statement of the facts to show that no other individual could do business in competition with the Colorado Fuel and Iron Company in this field unless he enjoyed the same advantage in the way of a freight rate. Nobody else sold to these large consumers, because in the very nature of things nobody else could sell. It appeared incidentally that there were mines in the Trinidad region, from which these rates applied, 10 I. C. C. REP.

not operated by the Colorado Company, but that this company did handle the product of those mines. It also appeared that when other individuals endeavored to take these contracts in competition with the Colorado Fuel and Iron Company they were compelled to pay the published rate and therefore were unable to furnish the coal. Under this arrangement the Santa Fe Company and the Colorado Fuel and Iron Company virtually entered into a partnership in the handling of this coal, in the execution of which the published schedules of the Santa Fe were utterly disregarded.

Those tariffs from the Trinidad district merely served as scarecrows to keep off all competitors and, further, as a pretext for declining to reduce rates from other coal fields upon the ground that there ought to be some relation between different districts. The act to regulate commerce requires that tariffs shall be in all cases published and observed. The purpose of this requirement is to inform the public of the rates under which the service of transportation can be secured. It is made a crime to depart from those provisions for the reason that otherwise a railway may drive out of business every competitor and then insist that there has been no discrimination, since there are no other shippers.

It has been intimated in some quarters that the Santa Fe, in the payment of these rebates, squandered its revenues in the interest of the fuel company. That phase of the subject was not under investigation, but nothing appears in this record to justify that suggestion. Mr. Biddle testified that these unlawful practices were entered upon for "business reasons," and we see no reason to doubt that they were prosecuted by the Santa Fe Company upon that basis. The Santa Fe and the Colorado Fuel and Iron Company, as already suggested, were virtually partners in this coal business. As partners they probably obtained the best price possible for coal at the various points of delivery, and apparently the division of the price obtained was not unduly in favor of the fuel company. The largest contract, that for five years with Phelps, Dodge & Co., contemplated the delivery f. o. b. Deming at \$4.05 per ton, of which the fuel company obtained \$1.15, which can hardly be considered an

extravagant price for its coal. The Santa Fe Company was asked to furnish a statement showing the quantity of coal handled for the last year through Deming upon these tariffs under which it refunded \$1.15 to the fuel company, but that statement has not yet been received.

5. The testimony also tended to show that while the Colorado Fuel and Iron Company was operating the mines of the American Fuel Company at Gallup the Santa Fe gave that company a special rate on its supplies. While this testimony was not at all conclusive, it was of a character to require explanation from persons having absolute knowledge in the premises. Mr. Biddle testified, in answer to an inquiry from the Commission on that subject, that so far as he knew these rebates on supplies had not been granted, but that this might have happened without his knowledge. No witness having knowledge was produced, and we have a strong impression that such special rates were enjoyed by the Colorado Fuel and Iron Company.

CONCLUSIONS.

The act to regulate commerce requires carriers to publish and adhere to their tariffs. The Atchison, Topeka and Santa Fe Railway Company has for the last five years wilfully and continuously violated this provision of the law in the respects above stated.

February 19, 1903, the so-called Elkins bill was enacted, providing that carriers should in no case transport traffic until a tariff had been published, and that the published tariff should be observed, and providing a penalty of not less than \$1,000 nor more than \$20,000 for each offense. The provisions of this statute extend both to the railway company which grants and the party which receives the concession. Both the Santa Fe and the Colorado Fuel and Iron Company systematically and continuously violated the provisions of that act in the particulars mentioned from the day of its passage down to November 27, 1904, when the tariffs under which this coal moved were reduced in all cases \$1.15. It would seem that the El Paso and Southwestern Railroad was also in violation of the same statute

10 I. C. C. REP.

during that period, but that company was not a party to this proceeding, and has not been heard.

It should be further observed that on March 25, 1902, the United States circuit court, in a suit begun at the instance and request of the Interstate Commerce Commission, enjoined the Atchison, Topeka and Santa Fe Railway Company to observe in all respects its published schedules of rates. That company from the date of this injunction down to November 27, 1904, was apparently in continuous disregard of that order of court in its failure to maintain these coal tariffs.

10 I. C. C. REP.

No. 655.

DULUTH SHINGLE COMPANY

v.

DULUTH, SOUTH SHORE & ATLANTIC RAILWAY COMPANY; CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; AND CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Decided February 2, 1905.

The defendants, by charging a higher rate on shingles than on lumber, in carloads, from Duluth, Minn., to Chicago, Ill., unjustly discriminate against shingles in favor of lumber, subject Duluth and complainant and other shingle shippers from that point to undue prejudice and disadvantage, and afford undue preference and advantage to other places from which shingles are carried at rates as low as those applied on lumber therefrom.

H. H. Phelps for complainant.

Bailey & Washburn for C., St. P., M. & O. Ry. Co.

Burton Hanson for C., M. & St. P. Ry. Co.

M. D. Grover for G. N. Ry. Co.

P. J. Farrell for the Commission.

REPORT AND OPINION OF THE COMMISSION.

YEOMANS, Commissioner:

The complainant in this case is a firm composed of D. A. Duncan, C. A. Duncan, F. A. Brewer and C. Neimeyer, doing business under the name of the Duluth Shingle Company, and
10 I. C. C. REP.

engaged as wholesale dealers in and shippers of shingles in carloads from Duluth to Chicago and points east thereof.

The complaint states that defendants, who are common carriers by railroad between Duluth and Chicago, maintain a rate of thirteen cents per hundred pounds for the transportation of shingles from Duluth to Chicago, which is unreasonable and unjust, and that a reasonable and just charge for such service would be ten cents per hundred pounds; that for a long time previous to January 15, 1903, when such rate was established, defendants had hauled shingles between the points named for ten cents per hundred pounds, which was and still is the rate charged for the transportation of lumber between said points; that said rate of thirteen cents per hundred pounds is unreasonable and unjust as compared with the rate exacted for the transportation of lumber; that defendants charge and receive more for transporting shingles for complainant than they demand from others for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, thereby subjecting complainant and its traffic to undue and unreasonable prejudice and disadvantage, and giving to said other shippers and their traffic undue and unreasonable preference and advantage, in violation of Sections 1, 2 and 3 of the Act to regulate commerce.

Complainant asks that the Commission make an order requiring defendants to cease and desist from said violations.

The defendants admit charging the rates alleged by complainant, but deny that the same is in violation of law.

FACTS.

We find the facts relevant to the issues presented in this case to be as follows:

Complainant is a firm engaged in buying and selling white pine shingles, which it ships in carloads over the defendants'

10 I. C. C. REP.

lines of railroad from Duluth to Chicago and points in Indiana and Ohio and elsewhere.

The defendants, the Duluth, South Shore & Atlantic Ry. Co., the Northern Pacific Ry. Co., the Great Northern Ry. Co., and the Chicago, Milwaukee & St. Paul Ry. Co., are common carriers of interstate commerce, by their own lines and in connection with other lines, from Duluth and other points in Minnesota to Chicago, Milwaukee, Racine and other places.

The rates charged by the defendants for the transportation of lumber and shingles are shown by the following tables prepared from tariffs filed with the Commission.

VIA ST. PAUL & DULUTH RAILROAD.

RATES IN CENTS PER 100 POUNDS.

From Duluth, Minn., To	Chicago, Ill.		Milwaukee, Wis.		Racine, Wis.	
	Lumber.	Shingles.	Lumber.	Shingles.	Lumber.	Shingles.
1895, June 10,	17	17	....	....	....	....
1896, March 18,	17	17	....	....	....	....
May 25,	16	16	....	....	....	....
Aug. 1,	16	16	....	....	....	....
1897, June 19,	14	14	....	....	....	....
1898, Aug. 26,	14	14	14	14	14	14
Dec. 4,	14	14	14	14	14	14
1899, Jan. 1,	14	14	14	14	14	14
1900, Jan. 10,	14	14	14	14	14	14
Mar. 12,	15	15	15	15	15	15
1901, Sept. 1,	15	15	14	14	15	15
1902, Apr. 3,	15	15	14	14	15	15
Apr. 6,	10	10	*10	*10	*10	*10
June 2,	10	10	10	10	10	10
June 20,	10	10	10	10	10	10
July 9,	10	10	10	10	10	10
Sept. 22,	10	10	10	10	10	10
Oct. 20,	10	10	10	10	10	10
1903, Jan. 15,	10	13	10	13	10	13
to date.						

*Effective 1902, May 5.

INTERSTATE COMMERCE REPORTS.

VIA D., S. S. & A. RY.

RATES IN CENTS PER 100 POUNDS.

From Duluth, Minn. To	Chicago, Ill.		Milwaukee, Wis.		Racine, Wis.	
	Lumber.	Shingles.	Lumber.	Shingles.	Lumber.	Shingles.
1893, Nov. 15,	17	17	17	17	....	....
1895, July 1,	17	17	16	16	....	....
1896, Apr. 17,	16	16	16	16	....	....
" 17,	16	16	16	16	16	16
1897, May 22,	16	16	16	16	16	16
June 18,	14	14	14	14	16	16
1898, Nov. 6,	14	14	14	14	14	14
1900, Mar. 25,	15	15	14	14	14	14
Apr. 8,	15	15	14	14	15	15
Sept. 18,	10	10	10	10	15	15
Oct. 2,	10	10	10	10	10	10
1903, Jan. 16,	10	13	10	13	10	13
to date.						

VIA C., M. & ST. P. RY.

RATES IN CENTS PER 100 POUNDS.

Date.	From St. Paul, Minneapolis and Minnesota Transfer To					
	Chicago, Ill.		Milwaukee, Wis.		Racine, Wis.	
	Lumber.	Shingles.	Lumber.	Shingles.	Lumber.	Shingles.
1892, Aug. 26,	14	14	14	14	14	14
1895, Dec. 10,	14	14	14	14	14	14
1897, June 22,	12	12	12	12	12	12
1900, Mar. 7,	13	13	13	13	13	13
1902, May 20,	10	10	10	10	10	10
Sept. 22,	10	10*	10	10*	10	10*
1903, Jan. 15,	10	13	10	13	10	13
to date.						

*1902, Sept. 22: The rate on Cedar Lumber, Cedar Poles, Cedar Posts, and Cedar Shingles is 13 cents per 100 lbs.

10 I. C. C. REP.

RATES IN CENTS PER 100 POUNDS.

Date.	From St. Paul, Minneapolis and Minnesota Transfer.				Duluth, Minn. to Chicago, Mil- waukee, Rockford, Racine, Ill.			
	To Chicago.		Mil- waukee.		Racine, Wis.		Rockford, Ill.	
	Lumber.	Shingles.	Lumber.	Shingles.	Lumber.	Shingles.	Lumber.	Shingles.
	Lumber.	Shingles.	Lumber.	Shingles.	Lumber.	Shingles.	Lumber.	Shingles.
1893, Nov. 8,	15	15	15	15	15	15	15	17
1896, Apr. 1,	15	15	15	15	15	15	14	17
Apr. 10-17,	14	14	14	14	14	14	14	16
1897, Apr. 17,	14	14	14	14	14	14	14	16
June 9,	12	12	12	12	12	12	14	14
July 9,	12	12	12	12	12	12	12	14
1898, Jan. 12-19,	12	12	12	12	12	12	12	14
1900, Mar. 8,	13	13	13	13	13	13	13	15
							1-2-3	1-2-3
1902, June 19,	10	10	10	10	10	10	13	13
July 14,	10	10	10	10	10	10	13	13
Sept. 22,	10	10	10	10	10	10	13	13
Oct. 3,	10	10	10	10	10	10	13	13
1903, Jan. 15,	10	13	10	13	10	13	13	13
Nov. 2,	10	13	10	13	10	13	13	13

1. Effective April 5, 1902, applicable to Chicago and Milwaukee only.
2. Effective April 18, 1902, applicable to Racine.
3. Effective May 1, 1902, rate to Racine is cancelled.

VIA WISCONSIN CENTRAL LINES.

Rates in cents per 100 pounds.

From Minneapolis and Minnesota Transfer.

Dates.	To Chicago, Ill.		Milwaukee, Wis.	
	Lumber.	Shingles.	Lumber.	Shingles.
1895, Apr. 22-27,	15	15	15	15
1896, Apr. 1-8,	14	14	14	14
1897, May 10,	14	14	14	14
May 27,	14	14	14	14
1898, Aug. 28,	12	12	12	12
Oct. 4,	12	12	12	12
1900, Mar. 7,	13	13	13	13
1901, Sept. 16,	13	13	13	13
1902, Apr. 8,	10	10	10	10
Sept. 2,	8	8	8	8
Sept. 22,	10	10	10	10
1903, Jan. 15,	10	13	10	13

The following is quoted from "Rules Circular W. T. L. No. 5, I. C. C. 384," showing freight classification.

LUMBER AND ARTICLES OF:

Lumber, except Walnut, Butternut, Cherry and woods of value; also the following articles in straight or mixed C. L.

‡Agricultural Implement Wood (in the rough).

†Barrel stock, viz.: Headings, Hoops and Staves.

Base Boards.

Bed Slats.

Blocks, Corner and Base.

Blocks, Head and Plinth.

Box Lumber or Shooks.

Carpenter's Mouldings.

Casings.

Combined Lath and Sheathing.

Fence Posts.

Fruit and Vegetable Packages, made from scarfed box material, described as follows: min. weight 30,000 lbs.; scarfed berry box material, in racks and bundles; boxes K. D. in bundles. N. O. S.; Melon crate material K. D. in bundles; Four package crates; Six package crates; Grape Packages, nested, handles and cover in bundles.

Grain doors (straight C. L. only).

Guttering, rough.

†Heading.

†Hoops.

Lath, pine.

Logs, Walnut (except squared, or with sides hewn for export).

Lumber, including ceiling, flooring (except wood carpet), wainscoting, Match Blocks, and circus seats (not upholstered nor with backs.)

Paving blocks.

Pickets.

Piles.

‡Plow Beams and Plow Handles (in the rough).

Sawdust.

‡Sawed Felloes (in the rough).

LUMBER RATES AND MINIMUM WEIGHTS, EXCEPT AS OTHERWISE PROVIDED.

‡On articles prefixed thus (‡) the lumber rates will apply only when such articles are not further finished than sawed, rived or split from the bolt.

†The rates on barrel stock to be in case *lower* than lumber rates.

*Lumber rates will not apply on shipments of shingles, in straight C. L. or in mixed C. L., with lumber from St. Paul, Minneapolis, Minn. Transfer, etc., or Lake Superior Ports to Chicago, Milwaukee or other Lake Michigan ports where specific commodity tariffs on shingles are published naming higher rates.

*Shingles.

‡Sleigh Wood (in the rough).

Spools (for barbed wire) K. D.

†Staves.

Tank Material (Wooden).

Telegraph and Telephone Poles.

Telegraph and Telephone Braces, Brackets, Cross Arms and Pins.

Tin Plate Boxes, Wooden, not further manufactured than having sides and bottoms nailed together, tops K. D. and tied in bundles.

‡Vehicle Wood (in the rough).

Well Tubing.

Window Stock, Aprons and Hoods.

ARTICLES TAKING HIGHER THAN LUMBER RATES:

Walnut, Butternut and Cherry Lumber; also Walnut Logs, squared C. L. Agricultural Implement, Sleigh and Vehicle, Wood, dressed in the white, Wagon Bows, bent.

*Wagon Wood, including Hubs and Spokes, sawed or turned to shape; also tenoned hubs and spokes not further finished than bored, mortised or primed C. L.

Wooden Road Scraper Sides.

Mahogany, Holly and Woods of Value (See classification). All other woods, lumber rates.

The following articles, when loaded in straight or mixed C. L., will take 1 cent per 100 lbs. above the lumber rates, subject to the minimum weights governing shipments of lumber (except as otherwise provided).

When loaded with articles taking lumber rates, they will take 3 cents over lumber rates, on the actual weight of such articles, provided they are specified on the shipping tickets; if not so specified the regular L. C. L. rating will apply; the total charges on the entire C. L. not to exceed the charges on a straight or mixed C. L. of articles taking one (1) cent per 100 lbs. above the lumber rates.

Angle Beads.

Astragals.

Balusters.

Balustrade Work.

†Base Boards.

‡Blinds, inside and outside.

†Blocks, Corner and Base.

†Blocks, Head and Plinth.

†Carpenter's Mouldings.

†Casing.

Closet Fittings.

Closet Seats.

Closet Tanks.

Corner Beads.

Cornice Brackets.

Cresting.

Door Jambs.

†Doors, Panel.

*3 cents above lumber rates subject to lumber minimum weights.

†Applies when manufactured from woods other than those enumerated above as taking lumber rates.

10 I. C. C. REP.

‡Doors, Screen.	Shelves.
‡Doors, glazed with common window glass, or unglazed (if glazed released).	Shutters, inside and outside.
Gable Ornaments.	Spindles.
Grille Work.	Stair Work (Newels, Risers, Treads, Railings, Balusters and Post Ornaments) K. D. and taken apart.
Interior Trimmings.	Store Fronts.
Panel Jambs.	Turned Work, entering into the construction of Buildings.
Panel Wainscoting and Ceiling.	‡Wainscoting.
Pantry Fittings.	Wash-tub Covers.
Pilasters.	Window, Door, Blind and Screen Frames, S. U. or K. D., minimum weight as follows: In cars under 34 feet inside measurement, 20,000 lbs.; in cars 34 feet and over inside measurement, 24,000 lbs.
Porch Newels.	‡Window Screens.
Porch or Piazza Columns.	‡Window Stools, Aprons and Hoods.
Porch Railings.	
Porch Work.	
Portiere Work.	
Rosettes.	
‡Sash, glazed with common window glass or unglazed (if glazed released).	
Scroll Work.	

The rate on cedar lumber, cedar poles, cedar posts and cedar shingles (Pacific Coast Traffic) was advanced by the C., M. & St. P. Ry. Co. three cents per 100 lbs. over the ten-cent regular lumber rate September 18, 1902, from Duluth, and September 22, 1902, from St. Paul, Minneapolis and Minnesota Transfer. With this exception an examination of the tariffs affecting defendants' lines fails to show that in any instance has there been any difference between the rate on lumber and the rate on shingles until the issue of the tariff complained of, effective January 15, 1903, when the rate on all shingles was advanced three cents per 100 lbs., from the points above named and points in the vicinity of Duluth called "Lake Head points," to Chicago, Ra-

NOTE: The foregoing rates will not apply on articles named when manufactured from Mahogany, Rosewood, Lignum Vitæ or other valuable foreign woods.

‡The minimum weight on sash, doors and blinds, screen doors and window screens, will be as follows: In cars under 34 feet inside measurement, 20,000 lbs.; in cars 34 feet and over, inside measurement, 24,000 lbs.

The basis for rates on all the inside finish material specified above will not apply on the articles named when polished or varnished. Such shipments will be subject to Western Classification Rating.

cine, Milwaukee and points taking the Chicago rate and which advance affects rates east of Chicago as far as New England.

Under the tariff of January 15, 1903, a rate of ten cents per 100 lbs. on lumber and thirteen cents per hundred lbs. on shingles was fixed to Chicago, for distances and from places, as follows: Duluth, West Duluth, Superior, South Superior, West Superior, 479 miles, St. Paul 410 miles, Minnesota Transfer, 415 miles and Minneapolis, 420 miles. A rate of twelve cents on lumber and thirteen cents on shingles was fixed for the following points near Duluth, viz.: Barker, Carlton, Cloquet, Fond du Lac, Howell, Ironton, Oneonta, Scanlon, Short Line Park, Smithville, Spirit Lake, Thompson, Wrenshall, Pokegama Junction, Saunders, St. Louis and Walbridge. The same rate for lumber and shingles was made from the following points: Star Lake, 403 miles, Minocqua, 384 miles, Tomahawk, 350 miles and Wausau, 311 miles, ten cents.

Three reasons are assigned for fixing the lumber rate at ten cents and the shingle rate at thirteen cents per 100 pounds.

First, to equalize the revenue derived from forest products, which, as shown by the statistics furnished, is effected by this adjustment; second, to compete with water transportation of lumber, there being an understanding that lumber shippers would ship largely by rail, rather than by water, if the ten-cent rate was established, whereas there was no competition by water for the transportation of shingles; and third, the traffic in shingles is limited in volume as compared with lumber; while vessels take full cargoes of lumber, they take only partial or "deck loads" of shingles in connection with other freight.

The volume of Pacific Coast (red cedar) shingles over defendants' lines largely exceeded the shipment of pine shingles produced in Minnesota and of which complainant's traffic entirely consists; this Pacific Coast product constituting about 80 per cent of the shingle traffic. Rates on lumber and shingles West of St. Paul are the same.

The D., S. S. & A. Ry. Co. (Sept. 18, 1902) and the C. M. & St. P. Ry. Co. (Sept. 22, 1902) first undertook to exact a higher rate on Western (Pacific Coast) shingles than on pine

10 I. C. C. REP.—32.

shingles, but found it impracticable because the cars would become mixed and they could not follow them, and therefore the rate was made to apply to the entire shingle product in order to avoid any charge of discrimination on the part of shippers of shingles.

While it has not been practicable to examine each of the thousands of tariffs and supplements filed with the Commission we are not advised of any instance in which shingles are not included in the same class with lumber and carried at the same rate by all the railroads in the United States, except over defendants' lines as above shown.

The following statement shows the comparative volume of traffic in lumber and shingles over the lines of the railways named.

SHIPMENT OF SHINGLES BY COMPLAINANT.

April 2, 1902, to May 16, 1903.

No. Cars.	Quality.	Av. Wt. Per Car.	Total Wt.
81	Air Dried.	33,908 lbs.	2,746,800 lbs.
84	Kiln Dried.	32,500 " Est.	2,743,600 "
119	A. D.-K. D.	33,204 " "	3,951,176 "
284			9,432,576 lbs.

SHIPMENT OF SHINGLES FROM DULUTH via C., M. & St. P. RY.

Period.	No. Cars.	Av.Wt. Pr. Car.	Total Wt.
Jan. 1 to June 30, 1902,	35	32,606 lbs.	1,141,210 lbs.
July 1 to Nov. 30, "	50	28,908 "	1,445,400 "
December, "	8	34,144 "	273,152 "
Jan. 1 to May 19, 1903,	22	34,689 "	763,158 "
Total,	115		3,622,920 lbs.

SHIPMENT OF LUMBER FROM DULUTH via C., M. & St. P. RY.

Period.	No. Cars.	Av.Wt. Pr. Car.	Total Wt.
Jan. 1 to June 30, 1902,	125	40,327 lbs.	5,040,875 lbs.
July 1 to Nov. 30, "	62	37,833 "	2,345,646 "
December, "	36	44,256 "	1,593,216 "
Jan. 1 to May 19, 1903,	103	39,764 "	4,093,692 "
Total,	326		13,073,429 lbs.

SHIPMENT OF SHINGLES FROM MINNEAPOLIS via C., M. & St. P. RY.

Period.	No. Cars.	Av.Wt. Pr. Car.	Total Wt.
Jan. 1 to June 30, 1901,	133	33,949 lbs.	5,515,317 lbs.
July 1 to Nov. 30, "	311	32,990 "	10,259,890 "
December, "	39	32,976 "	1,286,064 "
Jan. 1 to May 19, 1903,	197	31,030 "	6,112,910 "
Total,	680		23,174,181 lbs.

SHIPMENT OF LUMBER FROM MINNEAPOLIS via C., M. & St. P. RY.

Period.	No. Cars.	Av.Wt. Pr. Car.	Total Wt.
Jan. 1 to June 30, 1901,	241	44,430 lbs.	10,707,630 lbs.
July 1 to Nov. 30, "	400	47,659 "	19,063,600 "
December, "	96	41,287 "	3,963,552 "
July 1 to May 19, 1903,	330	47,079 "	15,536,070 "
Total,	1067		49,270,852 lbs.

SHIPMENT OF SHINGLES FROM MINNESOTA TRANSFER via C., M. & St. P. RY.

Period.	No. Cars.	Av. Wt. Pr. Car.	Total Wt.
Jan. 1 to June 30, 1901,	469	30,350 lbs.	14,234,150 lbs.
July 1 to Nov. 30, "	566	32,867 "	18,602,722 "
December, "	184	33,164 "	6,267,996 "
Jan. 1 to May 19, 1903,	531	34,473 "	18,305,163 "
Total,	1750		57,410,031 lbs.

SHIPMENT OF LUMBER FROM MINNESOTA TRANSFER via C., M. & St. P. RY.

Period.	No. Cars.	Av.Wt. Pr. Car.	Total Wt.
Jan. 1 to June 30, 1901,	134	44,338 lbs.	5,941,292 lbs.
July 1 to Nov. 30, "	202	42,819 "	8,649,438 "
December, "	55	43,156 "	2,373,580 "
Jan. 1 to May 19, 1903,	147	43,447 "	6,386,709 "
Total,	538		23,351,019 lbs.

SHIPMENTS via THE GREAT NORTHERN DURING YEAR ENDING APRIL 30, 1903.

From Duluth.	No. Cars.	Av. Wt.Pr. Car.	Total Wt.
Shingles,	4	31,375 lbs.	125,500 lbs.
Lumber,	196	41,194 "	8,230,600 "

**SHIPMENTS via NORTHERN PACIFIC DURING YEAR ENDING
APRIL 30, 1903.**

From Duluth.	No. Cars.	Av. Wt.Pr. Car.	Total Wt.
Shingles,	46	33,888 lbs.	1,558,850 lbs.
Lumber,	1018	39,010 "	39,712,370 "

RECAPITULATION.

Shingles shipped by complainant from Duluth to Chicago,	284 cars, 9,432,576 lbs.
Lumber shipped by defendants from Duluth to Chicago,	1540 cars, 61,016,399 lbs.
Shingles shipped by defendants from Minneapolis,	702 cars, 23,240,161 lbs.
Lumber shipped by defendants from Minneapolis,	1067 cars, 49,270,852 lbs.
Shingles shipped by defendants from Minnesota Transfer,	1750 cars, 57,410,031 lbs.
Lumber shipped by defendants from Minnesota Transfer,	538 cars, 23,351,019 lbs.

During the year previous to the hearing the complainant shipped nearly the entire shingle product from Duluth, about one-half of which was forwarded over defendants' lines to Chicago, and at the time of the hearing, May 19, 1903, complainant had contracted for the entire product of shingles at Duluth for the ensuing year, which it was estimated would amount to about 400 cars.

In the classification of June 25, 1902, and tariff complained of, it is provided that the following articles shall take the lumber rate:

Base Boards.
Bed Slats.
Blocks, Corner and Base.
Blocks, Head and Plinth.
Box Lumber, or Shooks.
Carpenters' Mouldings.
Casings.
Combined Lath and Sheathing.
Fence Posts.

Fruit and Vegetable packages made from scarfed box material described as follows: Minimum weight, 30,000 lbs.; scarfed berry box material in racks and bundles; boxes K. D. in bundles n. o. s.; melon crate material, K. D. in bundles; four package crates; six package crates; grape packages, nested handles and covers in bundles.

Grain Doors (Straight C. L. only).

Guttering—Rough.

Lath, pine.

Logs, Walnut (except squared or with sides hewn for export).

Lumber, including ceiling, flooring (except wood carpet), wainscoting, match blocks and circus seats (not upholstered or with backs).

Paving Blocks.

Pickets.

Piles.

Sawdust.

Tank material (Wooded).

Telegraph and Telephone Poles.

Telegraph and Telephone Braces, Brackets, Cross Arms and Pins.

Tin Plate Boxes, wooden, not further manufactured than having sides and bottoms nailed together, tops K. D. tied in bundles.

Well Tubing.

Window stock, Aprons and Hoods.

Some comparison is attempted to be made between shingles and certain articles in the classification taking the lumber rate and having the same minimum carload of 24,000 lbs. per car of 33 ft. 6 in. in length—for instance—box stuff, pine lath, sheathing, sawdust and other articles especially referred to in the testimony, claimed to be of less value and weight, the same or less than shingles per carload, but no figures are given by which weights, values or the volume of traffic can be satisfactorily compared.

Shingles being put up in bundles of uniform size—250 per bundle—can be handled much more conveniently and rapidly and packed more closely than some other articles, such as screens, mouldings and box stuff cut in different lengths which take the lumber rate.

Estimating the comparative revenues received by defendants, it is found that the average weight of carloads of shingles in 33 ft. and less than 34 ft. cars is 29,850 lbs. via the C., M. & St. P. Ry., producing a revenue of \$29.85 at 10 cents per 100 lbs. and \$38.80 at 13 cents per 100 lbs., while the average weight of carloads of lumber in cars of the same length, over the same line is 38,943 lbs., amounting at 10 cents to \$38.94,—practically the same revenue per car as is received for the transportation of shingles at 13 cents per 100 lbs..

10 I. C. C. REP.

Over the Chicago, St. Paul, Minneapolis & Omaha Railway, shipments of shingles from Minnesota Transfer amounting to 151 cars, averaged 31,326 lbs., which at a 13-cent rate per 100 pounds amounted to \$40.72, while during the same time there were 357 carloads of lumber hauled, averaging 40,713 pounds, amounting, at 10 cents per 100 lbs., to \$40.71.

CONCLUSIONS.

The determination of this case depends upon one question, namely, whether by charging 13 cents per 100 pounds for the transportation of shingles from Duluth to Chicago, the defendant carriers have violated the following provision of Section 3 of the Act to regulate commerce: "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever;" or in other words, whether there is made or given to any locality, or to any particular description of traffic, an undue preference or advantage, or whether any locality, or particular description of traffic is subjected to any undue or unreasonable prejudice or disadvantage.

Generally speaking the demand for and use of shingles as building material are quite as important and general as for any other lumber product, and the necessity is equally as great that such product shall be charged only a reasonable and equitable rate for its transportation.

Shingles being put up in bundles for shipment the work of handling is facilitated so that no more, and perhaps even less, labor is required than for the handling of many other lumber products classed with and charged the same transportation rate as lumber, such as laths, shooks, sawdust, box and moulding material and other stuff of the regular dimensions. The weight of shingles that can be loaded in a car will also compare favor-

ably with the above named and many other lumber products taking the lumber rate.

No testimony has been submitted as to the relative values of these various products, but it may be assumed safely, that shingles are worth as much per carload as the average of articles taking the lumber rate.

No claim has been made that there is any greater risk in shipping shingles than any other article included in the lumber classification.

One of the reasons assigned for a lower rate for the transportation of lumber than shingles was the alleged competition for the transportation of lumber by water, while there was no such competition for the transportation of shingles; that vessels never take a full cargo of shingles, but only partial or deck loads in connection with other freight. But are we to understand from this that vessels do take full cargoes of laths, sawdust and other kinds of lumber products so as to justify the lower rate charged for their transportation?

Another reason assigned for the higher rate exacted for the transportation of shingles was that the revenue derived from forest products might be equalized. And again, it may be asked, why laths, sawdust, etc., are transported at the lumber rate when the revenue per carload for their transportation would probably be less than that derived from the transportation of shingles per carload, even at the same rates?

It is pertinent to inquire further why the rate on shingles and lumber is the same from Star Lake, Tomahawk, Monaquia and Wausau, to the same points of destination.

The facts appearing in evidence are not consistent with defendants' claims, and do not support either of the reasons assigned for the difference between the rate on lumber and shingles.

Another important consideration is, that the only instance which has been brought to the attention of the Commission of any departure from the uniform practice of the railroads of classifying shingles with lumber and transporting them at the same rate is that complained of in this case.

The Commission has sought as far as practicable to secure the
10 I. C. C. REP.

establishment throughout the country of a uniform classification of freight, believing it to be to the interest and advantage of both carriers and shippers; and there does not seem to be any just or sufficient reason why shingles and lumber should be classed and rated differently in the case of the transportation complained of.

The Commission, therefore, finds that the defendant carriers unjustly discriminate against shingles in favor of lumber, subject Duluth and complainant and other shingle shippers from that point to undue prejudice and disadvantage, and give undue preference and advantage to other places from which shingles are transported, by exacting a higher rate therefor than for the transportation of lumber from Duluth to Chicago.

An order to cease and desist from such unjust discrimination will be entered in accordance with the conclusions above stated.

10 I. C. C. REP.

No. 707.

THE CENTRAL YELLOW PINE ASSOCIATION

v.

THE ILLINOIS CENTRAL RAILROAD COMPANY;
THE GULF & SHIP ISLAND RAILROAD COM-
PANY; THE SOUTHERN RAILWAY COMPANY;
THE MOBILE & OHIO RAILROAD COMPANY;
THE NEW ORLEANS & NORTH EASTERN RAIL-
ROAD COMPANY; THE ALABAMA GREAT
SOUTHERN RAILROAD COMPANY; THE CIN-
CINNATI, NEW ORLEANS & TEXAS PACIFIC
RAILWAY COMPANY; THE ALABAMA & VICKS-
BURG RAILWAY COMPANY; THE LOUISVILLE
& NASHVILLE RAILROAD COMPANY; THE MO-
BILE, JACKSON & KANSAS CITY RAILROAD
COMPANY.

Decided February 7, 1905.

Complaint was made of an advance by defendants of 2 cents per 100 pounds on April 15, 1903 (except as to the L. & N. R. Co., as to which the advance became effective June 22, 1903), in the rates on lumber in carloads from points in lumber producing territories east of the Mississippi River in Louisiana, Mississippi, and part of Alabama served by defendant roads, to Ohio River points, applying both on shipments locally to such Ohio River points and to shipments destined beyond. On September 9, 1899, the rate previously in effect from May 1, 1894, was advanced one cent, making a total advance of 3 cents since May 1, 1894. The rates prior to the advance on April 15, 1903, were remunerative to the defendant carriers. *Held:—*

1. That when a railroad company advances a rate which has been for some time in force, the fact of its continuance is in the nature of an admission against that company which tends to show the unreasonableness of the advance; and in this case the rates in effect for long periods prior to the advance are shown to have been profitable to the defendant carriers.

2. That the test of the reasonableness of a rate is not the amount of profit in the business of the shipper or manufacturer, but whether the rate yields a reasonable compensation for the services performed. Carriers necessarily and justly participate in the prosperity of their patrons in the resultant enlargement of their own business.

3. That the advance in rates by defendants was not justified by increased cost of operating the roads, for while the operating expenses have constantly increased, they have been enlarged by the inclusion therein of large expenditures for permanent improvements, and defendants' gross earnings have increased from year to year to such extent as to result in a constant increase of net earnings.

4. That the value of the entire property of a road employed for the public convenience can shed but little, if any, light upon the question whether the rate on one among thousands of articles of traffic yields its proper proportion of a fair return upon that value, and moreover, the voluminous and conflicting testimony in this case on that subject does not enable the Commission to determine the value of defendants' respective properties.

5. That the elements to be considered in determining the reasonableness of an entire system of rates are widely different from those involved in the question of the reasonableness of the rate upon a single commodity.

6. That the advance of rates complained of in this case was the result of concerted action by defendants and other carriers; and while the question whether such concert of action is in violation of the "Anti-Trust Act" is for determination only by the courts, it is the province and duty of this Commission, when the reasonableness of rates is in issue before it, to consider whether the advanced rates resulted from untrammelled competition, or were fixed by concert of action or combination of carriers.

7. That the rates in effect prior to the advance were reasonably high when compared with the rates on other commodities which are at all analogous to lumber in respect to value, volume, and the various conditions affecting the service of transportation.

8. That carriers have no right to advance a rate which is already reasonably high and which yields an adequate return for the services rendered solely because additional revenue is needed.

9. That logging roads, or "tap lines," to which the defendant M. & O. R. Co. grants allowances from its published rates, are not common carriers, but such tap lines are the private properties of mill owners, and the allowances are therefore unlawful. *Cent. Yellow Pine Assn. v. V. S. & P. R. R. Co.* (10 I. C. C. Rep. 193), cited and applied.

10. That section 3, of the Act to regulate commerce, which prohibits undue preferences as between individuals or localities, is not violated by the failure or refusal of defendants to make "tap line" allowances to mill owners in their territory while such allowances are granted to mill owners by other carriers in the territory west of the

Mississippi; but if the rate west of the Mississippi River, minus the allowance, is reasonable, it tends to support the proposition that a similar reduction east of the River would leave the rate reasonably high; and the M. & O. R. Co., by voluntarily making such allowances east of the River, practically concedes this proposition as to itself.

11. That no rule is more firmly grounded in reason or more universally recognized by carriers, than that the greater the tonnage of an article of traffic, the lower should be the rate, but defendants have made yellow pine lumber an exception to this rule.

12. That lumber rates should be relatively low, in view of the fact that lumber is inexpensive freight and few other commodities furnish to carriers so large a tonnage; that the lumber business is constant, yielding carriers revenue all the year; that no special equipment is constructed or furnished for its carriage; that it is loaded by shippers and unloaded by consignees, and where open cars are furnished the shipper is required, at considerable expense, to equip them so as to protect the lumber and the train; and that there is small risk and in case of accident the damage is insignificant.

13. That the advance on April 15, 1903, of 2 cents per 100 pounds in the rate from the shipping points in question to the Ohio River was not warranted, and that the resultant increased rates are unreasonable and unjust.

Green & Green and T. M. Miller for complainant.

Ed. Baxter for defendants.

Sidney T. Andrews for Illinois Central Railroad Company.

Claudian B. Northrop for Southern Railway Company.

REPORT AND OPINION OF THE COMMISSION.

CLEMENTS, *Commissioner*:

The complainant is an incorporated association composed, as alleged in the complaint, of a large number "of persons, firms and corporations" engaged in the business of manufacturing yellow pine lumber in the states of Mississippi, Alabama and that part of Louisiana east of the Mississippi River, its declared object being to protect the interests of the manufacturers of yellow pine lumber in that territory in the matter of transportation rates.

The defendants are common carriers by rail engaged in interstate commerce, and, in particular, in the transportation of yellow pine lumber from the mills and lumber plants of com-
10 I. C. C. REP.

plainant's members in said territory to, for the most part, the territory known as "Central Freight Association Territory," which lies on and north of the Ohio River and on and between the Mississippi River on the west and a line running through Buffalo and Pittsburg on the east, and complainant's members are dependent upon the defendants for the transportation of their lumber to the markets of the country.

The Mobile, Jackson & Kansas City Railroad was made a party defendant, but, it appearing that that road was not directly interested in or responsible for the rate or matter in issue, the case was on motion of counsel for the complainant dismissed as to it.

The complaint charges, in substance, that the defendants, on the one hand, and, on the other hand, the several railway companies carrying yellow pine lumber into the same markets from the territory west of the Mississippi River, embracing the states of Texas, Arkansas and that part of Louisiana west of that river, met through representative officials and by agreement advanced the rate on yellow pine lumber, from the territories both east and west of the Mississippi to points on and beyond the Ohio River in said Central Freight Association Territory, 2 cents per hundred pounds, making said advance applicable south of the Ohio River and effective on and from April 15, 1903, except as to the Louisville & Nashville road as to which it became effective June 22, 1903; that the defendants from time to time prior to April 15, 1903, had advanced their lumber rates, and that the rates effective prior to that date "contained really higher charges for the transportation of yellow pine lumber of complainant and others similarly situated than the reasonable and just value of said service would allow;" and that—

"Said increase on yellow pine lumber is unjust, unreasonable, arbitrary and discriminatory, in direct contravention of the provisions of the Act to regulate commerce, and is destructive of and wholly injurious to the business of complainant and others similarly situated, and largely impairs the value of their property by the placing of an unnecessary and grievous burden and tax upon the transportation of their products and by ren-

dering practically inaccessible their available markets and defeating equal competition in said large territory (Central Freight Association Territory) without any cause; that said unjust and unlawful increase imposes upon yellow pine lumber shipped by complainant's members and others similarly situated, carried as interstate commerce under like circumstances and conditions, an excessive burden out of line with and far more grievous than is sustained by the same products from other points and by other products and commodities of like weight, cost of carriage, value, service and all other conditions considered."

The complaint further charges that

"The railroads transporting yellow pine lumber from the yellow pine regions of Arkansas and Trans-Mississippi Louisiana, and which yellow pine lumber competes with the products of complainant's mills in the same market, not only charged lower freight rates to their patrons, but allow them a rebate in the shape of so-called tap line divisions through the logging railroads owned by them and used for bringing logs from the woods to their saw mills."

The complaint alleges many matters, which will be hereinafter considered, in support of these charges, and in conclusion prays that an order be made declaring said advanced rate "excessive, unjust and unreasonable as well as discriminative, in violation of the Act to regulate commerce," and requiring the defendants "to desist from enforcing their unlawful and unreasonable tariffs now effective on yellow pine lumber." There is also a prayer for general relief.

The defendants in their answers specifically deny all the charges in the complaint and also the principal matters set up therein as sustaining those charges. The main grounds upon which the defendants seek to justify the advance in the rate complained of, are:

1. The alleged improved market conditions prior to April 15, 1903, which resulted in an increase in the price of lumber.
2. The alleged increased cost of operating the railroads.
3. The alleged fact that lumber, considering its character and the conditions attending its transportation, was not yield-

ing its proportion of the revenue required by the defendants to meet their expenses.

The complainant claims, in brief, that the greatly increased and constantly increasing tonnage of the lumber traffic and of traffic in general of the roads and resultant increase in earnings, called for a reduction rather than an advance in the rate; that the rate, as before stated, prior to the advance yielded at least a reasonable, if not an excessive, return for the service rendered and that the facts, if they exist, that the lumber business had prospered and grown more profitable and that the expenses of the roads had increased, were no grounds for the advance of a rate already reasonably high.

After having given the entire record the long and careful consideration absolutely necessary, we find the following to be the controlling facts.

FINDINGS OF FACT.

1. The lumber producing districts which are concerned in the matters involved in this case may be divided into, first, territory west of the Mississippi composed of Louisiana west of that river, and Arkansas and Texas; second, Louisiana east of the river, Mississippi and part of Alabama, and, third, Georgia, Florida and part of Alabama, called Southeastern Territory. The lumbermen in each of these districts compete in the sale of their products in the same markets which are principally in the territory on and north of the Ohio River and on and between the Mississippi River on the west and a line running through Buffalo and Pittsburg on the east, known as "Central Freight Association Territory."

The roads of the defendant carriers are located in the second of these territories, namely, that east of the Mississippi, in Louisiana, Mississippi and part of Alabama, and run through and serve the lumber producing districts in that territory.

2. The advance in the rates complained of was from the lumber producing territories west as well as east of the Mississippi River and was made, in fact, though not expressly, by agreement between the defendants and the roads west of the Mississippi. Several meetings were held and consultations had be-

tween the representatives of the lines serving both territories which finally resulted in the advance made. It was understood to be impracticable for the lines east of the Mississippi to advance their rates without a corresponding advance by the lines west of the Mississippi and consequently there was a concurrence or agreement between them before the advance was made. The roads east of the Mississippi (defendants) appear to have taken the initiative in this matter.

The advance was 2 cents per hundred pounds, effective April 15, 1903, except as to the Louisville & Nashville road, as to which it became effective June 22, 1903. It was made applicable to St. Louis, East St. Louis and all Mississippi River crossings from St. Louis to and including Memphis and to all Ohio River crossings from Cairo to Cincinnati, both inclusive.

At Cairo traffic from the mills in a large portion of the lumber producing districts west as well as east of the Mississippi River meets or converges *en route* to destinations, the line to Cairo being the short line from the greater part of those districts. The rates to the other Ohio River crossings, Evansville, Louisville and Cincinnati, are said to be based on Cairo; that is, they bear a fixed relation to the Cairo rate, being higher by certain amounts and being correspondingly advanced or reduced as the Cairo rate is advanced or reduced. The through rates to interior points beyond the Ohio River in Central Freight Association Territory are made up of the full local rates of the roads north of the Ohio as the proportions of those roads and whatever is left of the through rates as the proportions of the roads south of the Ohio. The rates to interior points north of the Ohio are made on the lowest combination of rates to the Ohio plus the rates beyond, and are blanket rates, being the same from all shipping points or points of production to the same destination.

The Ohio River point rates are to the north bank of the River and include or absorb the bridge tolls. The bridge tolls or transfer charges are 2 cents per hundred pounds at Cairo, 1½ cents at Evansville, 1 cent at Louisville and 2 cents at Cincinnati.

3. The rates to the Ohio River crossings from Louisiana east
10 I. C. C. REP.

of the Mississippi and Mississippi and part of Alabama and from Louisiana west of the Mississippi and Arkansas at the date of the advance of 2 cents, April 15, 1903, and as increased by that advance, were as shown below:

From	To			
	Cairo,	Evansville,	Louisville,	Cincinnati.
Arkansas,	16 cts.	23 cts.	27 cts.	27 cts.
Louisiana, Mis- sissippi, and } Alabama }	16 cts.	22 cts.	21 cts.	23 cts.

(Note. The rate (16 cents) from Texas points to Cairo in force at date of advance has been restored.)

Peoria, Indianapolis and Columbus are fairly representative points or markets for lumber in Ohio, Indiana and Illinois. The total through rates via Ohio River crossings to those points and to Chicago at the date of the advance and as increased by the advance, were as follows:

To	Rates in force at date of advance.	Rates as increased by advance.
Peoria	23 cents.	25 cents.
Indianapolis	24 "	26 "
Columbus	27 "	29 "
Chicago	24 "	26 "

As before stated, the roads north of the Ohio charge their full local rates from the Ohio River to the lumber markets in Central Freight Association Territory as their proportions of the through rates.

There are divisions of the rates south of Ohio between what are termed the "originating roads" on which the lumber is principally manufactured and the roads intermediate between those originating roads and the Ohio River. The principal originating roads named in the testimony are the Gulf & Ship Island road, extending from Gulf Port on the Gulf of Mexico to Jackson, Miss., and the New Orleans & Northeastern road extending from New Orleans to Meridian, Miss. The Illinois Central road connects with the Gulf & Ship Island road at Jackson and on lumber received from the Gulf & Ship Island road at that point the Illinois Central allows that road a division of 7 cents out of the rate to the Ohio River. This allowance commenced in 1899 and by contract between the roads is to con-

tinue 10 years. At Meridian the Mobile & Ohio road connects with the New Orleans & Northeastern and on lumber received from that road allows it 6 cents out of the rate to the Ohio. The Alabama Great Southern road and its connections also pay at Meridian to the originating road a division of 6 cents.

4. The divisions allowed the originating roads are large in proportion to the length of the hauls made by them and in proportion to the balances of the rates left for the intermediate roads. For example, the average distance from lumber manufacturing points on the Gulf & Ship Island road to Jackson is 80 miles. At 7 cents a hundred pounds for a haul of this length, the rate per ton per mile is 1.75 cents or 17½ mills.

Out of the balance of the 16 cent rate to Cairo, to wit, 9 cents, left the Illinois Central road for the haul from Jackson to Cairo, a distance of 366 miles, comes the bridge toll of 2 cents at Cairo, leaving a net rate of 7 cents, which amounts to 3.8 mills per ton per mile.

While the rate per ton per mile yielded by the proportions of the through rates received by the intermediate roads is small, the rate per ton per mile under the total rate to the Ohio, *which the shipper has to pay*, is materially larger. For illustration, taking 80 miles as the average distance from lumber shipping points on the Gulf & Ship Island road to Jackson and the distance from Jackson to Cairo as 366 miles, there is a total of 446 miles, and for this distance the total rate of 16 cents yields a rate per ton per mile of 7.17 mills.

The short line distances from the two representative lumber shipping points, Hattiesburg, Miss., on the New Orleans & Northeastern road, and McComb City, Miss., on the Illinois Central road to Ohio River points, the total rates to those points as advanced and rates per ton per mile, are as shown in the following table:

To	From Hattiesburg.			From McComb City.		
	Miles.	Rates.	Rates per ton per mile.	Miles.	Rates.	Rates per ton per mile.
Cairo	432	16 cts.	7.4 mills.	444	16 cts.	7.2 mills.
Evansville	578	22 "	7.6 "	584	22 "	7.5 "
Louisville	622	21 "	6.7 "	643	21 "	6.5 "
Cincinnati	709	23 "	6.4 "	757	23 "	6. "

Under the rates in force at the time of the advance, April 15, 1903, to wit, 14 cts. to Cairo, 20 cts. to Evansville, 19 cts. to Louisville and 21 cts. to Cincinnati, the rates per ton per mile were as follows:

To	From Hattiesburg.	From McComb City.
	Rates per ton per mile.	Rates per ton per mile.
Cairo	6.4 mills.	6.3 mills.
Evansville	6.9 "	6.8 "
Louisville	6.1 "	5.9 "
Cincinnati	5.9 "	5.5 "

The average of the above rates from Hattiesburg is 6.3 mills per ton per mile and from McComb City 6.1 mills.

Lumber consigned via the Ohio River crossings to interior points north of the River is not always shipped by the short lines, but the rates to such interior points are, as before stated, the lowest combination of the rates to the Ohio plus the rates beyond. The advanced rates per ton per mile by the shortest available lines from representative shipping points in Alabama, Mississippi and that part of Louisiana east of the Mississippi River, to Peoria, Indianapolis, Columbus and Chicago, are as follows:

To	
Peoria	6.45 mills.
Indianapolis	6.77 "
Columbus	6.25 "
Chicago	6.07 "
<hr/>	
Average	6.38 "

Lumber is a low class traffic (class 6 under both the Southern and Official Classifications), much below the average classification, but the average rate per ton per mile on lumber originating on the Illinois Central road in 1903 was greater than the average, 5.91 mills, on all traffic. The lumber rates per ton per mile involved in this case are higher than those between numerous other points.

5. There have been from time to time changes or fluctuations in the rate. Prior to 1894 the roads west of the Mississippi claimed and were allowed a differential of 2 cents which neces-

10 I. C. C. REP.

sarily resulted in placing at a disadvantage in the common markets the shippers east of the Mississippi. In order to do away with this, a readjustment of their rates was made by the defendants east of the Mississippi and on May 1, 1894, the rate to Cairo from east of the Mississippi was reduced to 13 cents per hundred pounds, the latter being the rate in force from west of the Mississippi. The shippers from the two territories were thus placed on an equality so far as the *published* rates were concerned. The rate to Cairo remained 13 cents per hundred pounds up to September 9, 1899, a period of about 5 years, when it was advanced to 14 cents. It remained 14 cents from September 9, 1899, until April 15, 1903, nearly 4 years, when the advance of 2 cents complained of in this case was made, thereby increasing the Cairo rate to 16 cents. The rate to the other Ohio River points, Evansville, Louisville and Cincinnati, being, as above stated, based upon the Cairo rate, these changes in the rates to Cairo resulted in corresponding changes in the rates to those points.

6. Mills for the manufacture of lumber are located for the most part on railway lines where they traverse the lumber producing districts. Until the lumber near the mills is cut, the logs are hauled to the mills by teams. When this becomes impracticable, railways built into the timber are used. These railways are called "logging roads." The railway lines west of the Mississippi make a certain allowance to the mill owners for the transportation of the logs over these logging roads to the mills. This is called a "tap line allowance or division." This tap line allowance ranges from 1 and 2 cents per hundred pounds up to as high as 6 cents, and varies to some extent according to the destination of the traffic.

The mills east of the Mississippi located on the lines of defendants have logging roads as well as those west of the Mississippi. The defendants, as a rule, however, make no tap line allowances to those mills. The only exception is the Mobile & Ohio road which does grant such allowance to about four mills located on its line. The New Orleans & Northeastern road has from time to time, beginning with June 28, 1897, put in a tap line allowance of 2 cents per hundred pounds, but the other

10 I. C. C. REP.

roads east of the Mississippi objected and those allowances were withdrawn. There does not appear to be any reason for the allowance of tap line divisions west of the Mississippi which does not apply east of the Mississippi.

The tap line allowance which is paid by the roads west of the Mississippi amounts to a rebate or reduction from the regularly published rate and gives an advantage to the mills west of the Mississippi over those east of the Mississippi, although the published rates from both are the same.

7. The first lumber business east of the Mississippi following the civil war was local. Little, if any, lumber was shipped north of the Ohio River. The manufacture of lumber was then largely for the rebuilding of dwellings and towns which had been destroyed during the progress of the war. There was next the local demand of the railroads for structural and other lumber used by them. In 1875 lumber began to move north of the Ohio and the tonnage of the lumber traffic hauled by the roads has greatly and almost continuously increased from that time to the present. In 1877 and 1878 the demand for lumber north of the Ohio River was greater than the mills could supply and the price was advanced.

The shipments from points on the Louisville & Nashville road in Florida and Alabama to Ohio River points and beyond increased from 2540 cars in 1888 to 7011 cars in 1902 and 6502 cars for the nine months in 1903 ended September 30th.

The shipments in 1903, on April 15 of which year the advance of 2 cents in the rate was made, were largely greater than those of the preceding year, 1902. The shipments to points without the State of Mississippi from the mills of Eastman, Gardiner & Co. (one of complainant's members), at Laurel, Mississippi, on the Southern Railway and at the terminus of the Laurel Branch of the Gulf & Ship Island Railroad, increased from 2712 carloads in 1890 to 3530 in 1903, a gain of 818 carloads.

The movement of lumber via the Southern Railway from points in Florida, Georgia, Alabama and Mississippi and East Louisiana to points on and north of the Ohio River for the 10 months ending October 31, 1902, was 8027 cars, and for the

corresponding period of 1903, 9743 cars, an increase of 1716 cars or 21.3 per cent. The increase for the first quarter of 1903 preceding the advance in the rate was 29.5 per cent and for the remainder of the year following the advance was 18.2 per cent.

For the first 10 months of 1902, there was moved over the New Orleans & Northeastern Railway (part of the Southern Railway system extending from New Orleans through part of east Louisiana and Mississippi to Meridian) 5067 cars of lumber and for the corresponding period for the year 1903, 6039 cars.

The movement of lumber from Alabama, Florida, Georgia, Louisiana and Mississippi through Cairo and Mounds, Illinois, was in 1902, 18,269 cars and during 1903, 20,540 cars, an increase of 2271 cars.

8. The total lumber shipped from Mississippi and that part of Louisiana east of the Mississippi River is approximately 12,300 cars per month or 147,600 cars per annum. Of this 118,000 cars per annum are shipped to interior points and the balance to the seacoast for export. The estimate is that expressed in feet the shipments to the interior amount to about 1,500,000,000 feet.

There is a rich pine region in Alabama between Montgomery and Mobile and a large number of lumber mills, and also mills in Florida and Georgia, but the testimony does not show the total shipments from these mills.

The capital invested in the lumber business exclusive of the lumber in Mississippi, East Louisiana and Alabama is estimated at \$5,000,000 and the total annual value of the lumber product at about \$16,000,000.

9. The advance of 2 cents per hundred pounds amounts on the aggregate output of the lumber mills to a materially large sum. The average loading per car of 404 cars of lumber shipped from the mills of Eastman, Gardiner & Co., (Laurel, Miss.) during the month of June, 1903, was 43,538 pounds. On this carload the advance is something over \$8.70, and on the 404 cars, over \$3,514.80. On the 118,000 cars (with the same average carload applied) shipped annually to interior points

10 I. C. C. REP.

from Mississippi and East Louisiana, the aggregate increase in rate would be \$1,026,600.

The weight of lumber depends upon whether it is green or dried, rough or manufactured, and also, upon its dimensions. The testimony in this and other cases indicates that the average weight per 1000 feet is approximately 3300 pounds. The advance of 2 cents per 100 pounds on 1,000 feet of this average weight is 66 cents, and on 1,500,000,000 feet, the estimated amount of lumber expressed in feet, shipped from Mississippi and East Louisiana to the interior, it would be \$990,000.

If shipments from the lumber districts west of the Mississippi and from those in Alabama, Georgia and Florida be included, the aggregate amount resulting from the advance will, of course, be very much larger.

10. The prices of grades A, B and C, yellow pine lumber, consisting, respectively, of 1st and 2nd flooring (A), common flooring (B) and dimension stuff and timber under 12" x 12"-30" (C), in the *Chicago market*, January 1, 1892, and September 30, 1903, were as follows:

Grade.	Prices, January, 1892.	Prices, Sept., 1903.
A	\$21.00 to \$22.00	\$21.00 to \$22.00
B	\$15.00 to \$16.00	\$18.50 to \$19.50
C	\$21.50 to \$23.50	\$19.50 to \$22.00

During the period from January, 1892, to September, 1903, there were many variations in the *Chicago* prices. They appear to have been lowest from 1895 to 1899, both inclusive. The prices for the first quarter of each of those years were as follows:

Grade.	1895.	1896.	1897.	1898.	1899.
A	\$14.00	\$16.00-\$16.50	\$12.00	\$14.00	\$15.00-\$15.50
B	\$11.00-\$11.50	\$13.00-\$14.00	\$10.00	\$12.00	\$12.50-\$13.00
C	\$16.50-\$17.00	\$15.75-\$17.00	\$15.50	\$18.00	\$15.00-\$17.00

Prices from 1899 to and including September 30, 1903, were as follows:

	1900.	1901.	1902.	1903.
Grade.	First Quarter.	First Quarter.	First Quarter.	Third Quarter ending Sept. 30.
A	\$21.25-\$22.25	\$19.00-\$20.00	\$22.50-\$23.50	\$21.00-\$22.00
B	\$18.25-\$18.75	\$16.50-\$17.00	\$18.50-\$19.50	\$18.50-\$19.50
C	\$18.75-\$21.25	\$18.50-\$21.00	\$19.50-\$22.00	\$19.50-\$22.00

While the prices in the *St. Louis market* on the different grades and dimensions of lumber fluctuated during the period from January 15, 1900, to April 1, 1903, they were not materially different at those dates. In some instances they were somewhat higher in April, 1903, than in January, 1900, in others lower and in others the same. For example:

	Jan. 15, 1900.	April, 1903.
Flooring, Edge Grain A.	\$26.25	\$27.25
“ “ “ B.	\$24.75	\$24.75
“ Flat “ A.	\$20.75	\$20.25
“ “ “ B.	\$19.75	\$19.25
“ No. 1 Common	\$17.75	\$16.25
“ No. 2 “	\$15.25	\$12.25
Partition A.	\$22.50	\$21.75
Bevel Siding A.	\$15.25	\$14.00
Common Boards	\$17.50	\$18.00
Fencing	\$16.50	\$16.00
Heavy Joists	\$17.00	\$17.50

The average prices of the lumber sold at the mills of the Gary-Fatherree Lumber Company of Perry, Miss., the J. J. Newman Lumber Company of Hattiesburg, Miss., and the J. E. North Lumber Company of Bond, Miss., were for the periods named, as follows:

Gary-Fatherree Lumber Co.

From April to December 31, 1900	\$12.24
For the year, 1901	\$10.45
For the year, 1902	\$10.97
From Jan. 1 to Oct. 31, 1903	\$12.54

J. J. Newman Company.

For the year, 1900	\$10.89
For the year, 1901	\$10.36
For the year, 1902	\$11.20
For the ten months ending Oct. 31, 1903	\$10.54

J. E. North Co.

From Jan. 31 to Dec. 31, 1901	\$11.52
For the year, 1902	\$12.01
For the 10 months ending Oct. 31, 1903	\$10.24

The average market and mill prices of lumber do not appear to have materially changed from 1900 to 1903, both inclusive. The mill men have not been able to add the 2 cent advance in 10 I. C. C. REP.

rate to the mill price of their products and that since April 15, 1903, the date of the advance, the profit realized by them has been decreased by the amount of the advance.

11. In estimating the cost incident to the manufacture of lumber, the mill owners examined as witnesses included "stumpage," which is the timber in standing trees without the land. The value of stumpage depends upon its proximity to the mills, being the more valuable the nearer the mill. It varies in price according to its location and quality from \$1.00 to about \$3.50 per thousand feet. The further items of cost that enter into the manufacture of lumber are labor, management of the business, supplies of all kinds, taxes, insurance and depreciation of the property.

The following are statements for the years ending April 30, 1902, and 1903, respectively, of the average sale price of lumber per thousand feet at the mills of the Fernwood Lumber Company of Fernwood, Miss., the cost of manufacture including stumpage and the profit or difference between the sale price and the cost.

May 1, 1901, to April 30, 1902.

Manufactured feet.	Mill cost per M. incl. \$1. stumpage.	Average sale price.	Diff. cost & sales price per M.	Diff. cost & sales price for year.
21,758,871	\$0.39	\$11.43	\$2.04	\$44,388.09

May 1, 1902, to April 30, 1903.

Manufactured feet.	Mill cost per M. incl. \$2.25 per stumpage.	Average sale price.	Diff. cost & sale price per M.	Diff. cost & sales price for year.
23,206,773	\$10.93	\$12.35	\$1.42	\$33,081.41

(The stumpage in the second of the above statements is given at \$2.25 because the market price had then advanced to that figure. In the above estimates of cost of manufacture interest is excluded.)

The capital invested in the Fernwood plant is over \$598,690. The difference between sales price and cost for the year ending April 30, 1902, \$44,388.09, is over 7 per cent on that capital and the difference for the year ending April 30, 1903, \$33,081.41, is about 6 per cent on that capital.

At the mills of Eastman, Gardiner & Company (Laurel,
10 I. C. C. REP.

Miss.) the average price per thousand at the mill for the year 1902-3 was \$11.77 and the cost of manufacture, including stumpage at \$2.50 per thousand, was \$10.50, leaving a profit of \$1.27 per thousand. The capacity per annum of the mills of Eastman, Gardiner & Company is stated to be 60,000,000 feet and a profit of \$1.27 per thousand feet on that capacity would amount to \$76,200. The capital invested in those mills, excluding the land, is given at from \$600,000 to \$700,000. A profit of \$76,200 would be 10.88 per cent on a \$700,000 investment. The evidence does not show that the mills are run to their full capacity.

Mr. Gardiner, of Eastman, Gardiner & Company, was requested by counsel for the defendants to furnish copies of the annual balance sheets of the company showing the actual profits or results of the business for the years, 1901, 1902 and 1903, but the board of directors of the company refused to allow such copies to be furnished on the grounds that it would be divulging the private business of the company and that such data could have no bearing on the case.

The lumber business has constantly grown since it started. The capacity of the mills of Eastman, Gardiner & Company has been increased from 25,000,000 feet to 60,000,000 feet and their sales were 5,000,000 feet greater up to December, 1903, than for the preceding year, but the average price per thousand was 48 cents less.

12. It is estimated that the annual depreciation or deterioration of mill property is 10 per cent. After the lumber is exhausted the mills are of comparatively little value. Lands from which the timber has been cut are valuable for farming purposes. As the timber has been cut and the country cleared up near the railroad, the development in agriculture and enterprises of all sorts has been material. A number of flourishing towns have grown up between New Orleans and Jackson and elsewhere in the lumber districts. For instance, there is McComb City with a population of 6,000 and smaller towns such as Brookhaven, Crystal Springs, Summit and Hazelhurst. There are also a number of cotton plantations, cotton factories and oil mills. The value of ordinary farming lands in the section of

10 I. C. C. REP.

the country along the railroads where there had been pine forests has grown and varies from \$5.00 to \$10.00 per acre.

There has not been any falling off in the value of pine lands since the advance in the rate, nor has there been any diminution in the output of the lumber by reason of the advance. The value of the property and the output have not been diminished. The effect has been simply to diminish the net earnings of the mills.

13. Statements introduced by the defendants show increases in wages paid, and in the prices of material and equipment required, by them, such as steel rails, coal, lumber, locomotives, box, flat and coal cars. The statements relate, principally, to the period of 5 years from June 30, 1898, to June 30, 1903.

While there has been a material advance in the cost of steel rails during those five years, the price in 1899 being \$20.75 a ton and in 1903, \$31.82 a ton, there does not appear to have been any material advance for the last three of those years, the price for 1901 being \$31.12, for 1902, \$29.97 and for 1903, \$31.82.

The cost of coal is stated to have been \$1.78 in 1901, \$1.76 in 1902 and \$1.96 in 1903. From July 1897 to June 1900, the average cost of coal at the mines (coal used by the Illinois Central road) was 85.36 cents and from the latter date up to June 1903, there has been an increase of a little over 10 cents a ton.

As before stated (Finding 10, *supra*) the average market and mill prices of lumber do not appear to have materially changed from 1900 to 1903. The mill prices paid for stringers and bridge ties by the New Orleans & Northeastern Road were the same for both the years, 1902 and 1903, being \$15 for stringers and \$11.50 for ties, and for guide rails the price in 1902 was \$11.00 and in 1903, \$12.00 the increase being only in guide rails.

The aggregate amounts paid annually for locomotives, box, flat and coal cars, have increased and also their prices. The aggregate increase is due largely, if not mainly, to the increase in the number bought and the advance in price is due princi-

10 I. C. C. REP.

pally to the finer quality and greater capacity of the equipment used.

There has been a material increase in the total amount of wages paid employees, including engineers, firemen, brakemen, switchmen, trackmen, etc., from 1898 to 1903, which is also attributable to the increase in the number of such employees as well as to an advance in their wages.

The wages of the *employees of the mill companies* have also grown higher and the prices of the supplies required in the manufacture of lumber have advanced. These supplies are to a material extent the same as those used by the railways such, for example, as rails, ties, etc., for the logging roads. It is estimated that during the two years, 1902 and 1903, the cost of the manufacture of lumber increased about 10 per cent.

14. The operating expenses of the carriers have constantly grown larger, but the total annual increases in operating expenses are due, mainly, to the constant growth or enlargement of the business of the roads. This growth in business has resulted from the larger mileage operated, the development and increased prosperity of the country traversed by the roads and from advancement in methods of operation and additions to and improvements in equipment of all kinds. The business of the roads, or the tonnage of traffic transported by them, not only in the item of lumber as heretofore shown, but also in traffic generally, has grown to a most material extent.

While operating expenses have increased for the reasons named, there has also been a constant increase in gross earnings to such an extent that there has been a resultant increase in net earnings.

The following table, the items of which are taken from the reports of the defendants to the Commission, show for the years named as to their respective roads, (1), gross earnings from operation, (2), total operating expenses, (3), percentages of operating expenses to earnings, (4), net earnings, (5), net earnings per mile of road, (6), and total mileage operated.

10 I. C. C. REP.

Roads.	Gross earnings from operation.	Total operating expenses.	Percentage of operating expenses to earnings.	Net earnings.	Net earnings per mile of road.	Total mileage operated.
Ill. Cent. R. R. (line) 1890.....	\$5,644,115	\$3,551,310	62.92	\$2,092,805	\$2,340	894.41
south of Cairo, Ill.). { 1903.....	16,193,850	10,624,241	65.61	5,569,609	4,051	1,374.71
Increase	\$10,549,735	\$6,072,931	2.69	\$3,476,804	\$1,711	480.30
L. & N. R. R. Co. (line) 1890.....	\$11,841,865	\$6,892,145	58.20	\$4,949,720	\$3,687	1,342.48
south of Ohio river). { 1903.....	33,334,612	22,462,486	67.38	10,872,126	3,322	3,273.26
Increase	\$21,492,747	\$15,570,341	9.18	\$5,922,406	.....	1,930.78
Southern Ry. Co. (line in) 1895.....	\$9,099,403	\$5,868,651	64.50	\$3,230,752	\$1,474	2,191.63
Va. and Carolinas). { 1903.....	20,803,851	13,833,223	66.49	6,970,628	1,986	3,510.65
Increase	\$11,704,448	\$7,964,572	1.99	\$3,739,876	\$512	1,319.02
Southern Ry. Co. (line W.) 1895.....	\$7,785,047	\$5,428,393	69.73	\$2,357,254	\$1,071	2,200.31
of Va. and Carolinas). { 1903.....	19,072,904	13,984,134	73.32	5,088,860	1,570	3,248.45
Increase	\$11,287,347	\$8,555,741	3.59	\$2,731,606	\$499	1,048.14
N. O. & T. P.) 1890.....	\$4,301,515	\$2,631,076	61.17	\$1,670,439	\$4,938	338.26
Ry. Co. { 1903.....	6,153,580	4,431,571	72.02	1,722,009	5,099	337.73
Increase , , ,	\$1,852,065	\$1,800,495	10.85	\$51,570	\$161	.....

10 I. C. C. REP.

Roads.	Gross earnings from operation.	Total operating expenses.	Percentage of operating expenses to earnings.	Net earnings.	Net earnings per mile of road.	Total mileage operated.
Alabama Great Southern R. R. Co.	\$1,961,247 2,670,646	\$1,268,235 1,900,748	64.66 71.17	\$693,012 769,898	\$2,345 2,488	331.32 309.41
Increase	\$709,399	\$632,513	6.51	\$76,886	\$143	.....
N. O. & N. E. R. Co.	\$1,219,133 2,273,617	\$851,854 1,592,005	69.87 70.02	\$367,279 681,612	\$1,875 3,479	195.90 195.90
Increase	\$1,054,484	\$740,151	0.15	\$314,333	\$1,004	.....
Mobile & Ohio R. R. Co.	\$2,937,645 6,836,029	\$2,016,443 5,077,311	68.65 74.27	\$921,202 1,759,318	\$1,340 2,013	687.60 874.12
Increase	\$3,898,984	\$3,060,868	5.62	\$838,116	\$673	186.52
Alabama & Vicksburg Ry. Co.	\$676,449 1,149,039	\$476,334 818,966	70.42 71.27	\$200,115 330,073	\$1,396 2,312	143.39 142.78
Increase	\$472,590	\$342,632	.85	\$129,958	\$916	.....
Gulf & Ship Island R. Co.	\$63,209 1,705,047	\$41,011 1,051,687	64.88 61.68	\$22,198 653,380	\$317 2,603	74.75 251.00
Increase	\$1,641,838	\$1,010,676	.....	\$631,162	\$2,286	176.25

In the "total operating expenses" in the above table are included expenditures which result in the permanent improvement or betterment of the property of the roads, such as, expenditures for right of way and station grounds, real estate, grading, tunnels, bridges, trestles and culverts, rails, ties, crossings and cattle guards, telegraph lines, station buildings and fixtures, shops, round houses, turntables, water stations, fuel stations, grain elevators, storage-warehouses, docks and wharves, electric light plants and electric motive power plants, gas making plants, and miscellaneous structures. There are also included expenditures for equipment in the way of locomotives and cars of all kinds.

In the following table are shown for the years ended June 30, 1901, 1902 and 1903, expenditures by the roads named for permanent improvements or betterments and also for locomotive and car equipment, which expenditures are included in "total operating expenses." The expenditures for the former are under heading "on account of construction" and for the latter under the heading, "on account of equipment."

10 I. C. C. REP.

15. While the 13 cent rate to Cairo was in force from 1894 to 1899, the testimony is that it yielded a profit to the carriers. The same is true as to the 14 cent rate in force from 1899 to the date of the advance, April 15, 1903. This rate of 14 cents appears to be reasonably high when compared with the rates on other kinds of lumber and on yellow pine lumber from other points and when compared with the rates on other commodities which are at all analogous to lumber in respect to value, volume, and the various circumstances and conditions affecting the transportation of traffic.

From 1894 to 1899, under the 13 cent rate, and from 1899 to 1903, under the 14 cent rate, there was a steady annual growth in net earnings of the defendants, with the exception of the Cincinnati, New Orleans & Texas Pacific Railway Company. The net earnings at the beginning and conclusion of each of those periods are shown below:

NET EARNINGS UNDER 13 CENT RATE.

Roads.	1895.	1899.
Southern Ry. Co.....	\$5,558,006	\$8,853,160
Illinois Central R. R. Co.....	6,762,382	9,911,408
Louisville & Nashville R. R. Co.....	7,052,156	8,250,275
Cincinnati, New Orleans & Texas Pacific Ry. Co.	1,104,591	1,758,931
Alabama Great Southern R. R. Co.....	580,075	642,285
New Orleans & Northeastern R. R. Co.....	278,098	439,150
Mobile & Ohio R. R. Co.....	1,009,393	1,182,238
Alabama & Vicksburg Ry. Co.....	151,871	216,154
Gulf & Ship Island R. R. Co.....	22,198	110,563
1897.		

NET EARNINGS UNDER 14 CENT RATE.

Roads.	1899.	1902.
Southern Ry. Co.....	\$8,853,160	\$12,076,229
Illinois Central R. R. Co.....	9,911,408	14,572,907
Louisville & Nashville R. R. Co.....	8,250,275	9,851,946
Cincinnati, New Orleans & Texas Pacific Ry. Co.	1,758,931	1,636,797
Alabama Great Southern R. R. Co.....	642,285	798,771
New Orleans & Northeastern R. R. Co.....	439,150	592,128
Mobile & Ohio R. R. Co.....	1,182,238	1,625,019
Alabama & Vicksburg Ry. Co.....	216,154	278,956
Gulf & Ship Island R. R. Co.....	110,563	452,855

1Decrease.

NOTE.—Up to September 9, 1899, the earnings were under the 13 cent rate.

10 I. C. C. REP.

16. A large amount of testimony, much of it conflicting, has been introduced in behalf of both the complainant and defendants in relation to the financial history and transactions of the defendants, their capitalization, funded debts, cost of construction, &c., but this testimony does not satisfactorily show either the total cost of construction or the present value of the roads and their property used for the convenience of the public.

The financial condition of the roads appears to have steadily improved for a large number of years up to and including the year 1903, in which the advance complained of was made. The roads were prosperous at the date of and for years prior to the advance; they were doing a largely increased business with, it is true, a largely increased expense, but there was, as a rule with no material exceptions, a constant increase from year to year in *net* earnings. The annual reports of the defendants to the Commission show that dividends have been declared by them, as follows:

The Southern Railway Company has declared dividends for each year from 1897 to 1903, both inclusive, ranging from \$543,000, 1 per cent on \$54,300,000 of preferred stock, in 1897, up to \$4,500,000, 7½ per cent on \$60,000,000 of preferred stock, in 1903;

The Illinois Central Railroad has declared dividends for each year from 1888 to 1903, both inclusive, the dividend in 1888 amounting to \$2,450,000, and being 3½ per cent on \$30,000,000 and 3½ per cent on \$40,000,000 of common stock, and in 1903, \$5,702,400, 6 per cent on \$95,040,000 of common stock;

The Louisville & Nashville Railroad Company has declared dividends for each year from 1899 to 1903, both inclusive, ranging from \$1,848,000, about 3.50 per cent on \$54,911,520 of common stock in 1899, up to \$3,000,000, 5 per cent on \$60,000,000 of common stock, in 1903;

The Alabama & Vicksburg Railway Company has declared dividends for each year from 1897 to 1903, both inclusive, ranging from \$21,000, 3 per cent on \$700,000 of common stock, in 1887, up to \$63,000, 6 per cent on \$1,050,000 of common stock, in 1903;

The Alabama Great Southern Railroad Company has declared dividends for each year from 1896 to 1903, both inclusive, ranging from \$190,571, 5.64 per cent on \$3,380,350 of preferred stock, in 1896, up to \$309,061, 9.15 per cent on \$3,380,350 of preferred stock, in 1903;

The Cincinnati, New Orleans & Texas Pacific Railway Company has declared a dividend for the year 1903, the dividend being \$100,000, 5 per cent on \$2,000,000 of preferred stock;

In 1903, the Mobile & Ohio Railroad Company declared a dividend of \$107,412, 2 per cent on \$5,370,600 of common stock;

In 1903, the Gulf & Ship Island Railroad Company declared a dividend of \$100,000, 2 per cent on \$5,000,000 of common stock.

All of the defendants, which, as above stated, have declared dividends, also report large surpluses earned in addition to such dividends.

The New Orleans & Northeastern Railroad Company appears to have declared no dividends, but reports a growing (with the exception of 1901) surplus for each year from 1900 to 1903, both inclusive, to wit, in 1900, \$139,411; in 1901, \$90,547; in 1902, \$193,045; in 1903, \$253,809.

17. The car equipment and yard and shop facilities of the roads were not sufficient to handle with dispatch the large increase in the volume of the lumber traffic and traffic generally during 1902 and the Spring of 1903. The net results to the carriers could have been much improved if the transportation had not been under congested conditions. The congestion was principally at junction points and terminal points. It was greatest at Meridian and Jackson, and involved loss not only to the carrier but to the lumber shipper as well. This condition was not confined to the lumber business or lumber districts but affected traffic generally throughout the country. Notwithstanding the congestion, the gross and net earnings of the roads continued to increase and were very large during the time it prevailed.

The freight transportation equipments and facilities of the roads have now been greatly improved both in quality and

quantity, and also their roadbeds and physical conditions generally. While the money thus spent has been added to operating expenses, the improvements made have not only increased the earning capacity of the roads and consequently their earnings but have also lessened the cost of operation. The testimony of witnesses for the roads is that a decrease in the rates on traffic in general has been "going on throughout the United States" since the improvements in transportation have been put in operation.

18. No special equipment in the way of cars is furnished or required for hauling lumber. It may be moved in open or flat cars, gondola cars or box cars, which are also used in handling other traffic. Open or flat cars and gondolas are used mostly for undressed or rough lumber and for lumber which is too long to be placed in box cars. The box cars are used for the dressed and better classes of lumber. These better classes of lumber would not be loaded in an open, flat or gondola car except in an emergency or unless it was too long for box cars. On the Mobile & Ohio road it is said that 65 per cent of the cars used in transporting lumber are flat or open cars, while on the other roads only about from 15 to 30 per cent of the cars used are flat or open. During the month of March, 1903, said to be a fairly representative month, the total number of lumber cars shipped over the Louisville & Nashville road from Alabama was 649, of which 519, or 80 per cent, were box cars, and the remaining 130, about 20 per cent, were flat and gondola cars. The difference in this respect between the Mobile & Ohio road and the other roads is said to be because the lumber manufactured on the line of the Mobile & Ohio road is not of as high a grade as that on the other roads.

It costs somewhat less and is easier to load with lumber an open than a box car, but the rates on the open cars, while now the same, were formerly higher than on box cars; having been at one time 7 cents higher and afterwards 3 cents. This difference in rates is stated to have been made because box cars are more adapted to other freight besides lumber than are open cars and fewer of the former, therefore, return empty. A large proportion of the box cars come south loaded with grain and

10 I. C. C. REP.

merchandise. The gondolas are used by the roads to a large extent in hauling coal south, but, for the most part, the open or flat cars return empty. The testimony does not show definitely the proportion of cars used in shipping lumber which return empty.

It is necessary that open or flat cars of lumber be equipped with standards, braces and supports, for the purpose of protecting the load and the train, and this equipment is required to be furnished and attached to the car by the shipper. The witnesses for complainant and for defendants vary widely as to the cost of this equipment. Where the Master Car Builders' Association rules as to the nature of the equipment and character of lumber to be used, are complied with, the cost per car, including value of lumber, labor, nails, and freight on weight of equipment, is about \$3.50. The standards and other equipment have to be removed at the end of the trip and it is necessary that the shipper attach new equipment for each shipment. This equipment is not necessary where box cars are used. There are similar requirements as to the equipment of open or flat cars used in shipping other commodities which are shipped in those cars, such as structural material, carriages and machinery.

19. Cars transporting lumber are not, as a rule, loaded to their capacity. The greater the proportion of open cars used, the larger is the percentage of loading to the stenciled or marked capacity, because on those cars there is nothing in the way of a box to limit the amount of lumber that can be put upon them. The box cars that are furnished for the movement of lumber are built primarily to handle grain and merchandise and cannot be loaded with lumber to their full capacity unless the lumber is cut of such length as to occupy all the cubical space. The loading more nearly approximates the capacity of the car in case of green than of dry lumber.

The average capacity of 404 cars shipped during June, 1903, from the mills of Eastman, Gardiner & Company (Laurel, Miss.) was 58,767 pounds per car, and the average loading was 43,538 pounds per car, 74.1 per cent of the loading capacity.

The average capacity of 649 cars shipped over the Louisville & Nashville road from Alabama during March, 1903, was

10 I. C. C. REP.

61,225 pounds per car and the average loading was 42,592 pounds, 69.6 per cent of the loading capacity.

The average capacity of 51 cars shipped during December, 1902, from Fernwood, Miss., was 57,909 pounds per car and the average loading 49,411 pounds, 85 per cent of the loading capacity.

The average capacity of 25 cars shipped in 1903, via Illinois Central road, to Niagara was 68,400 pounds and the average loading, 53,133 pounds, 77.6 per cent of the loading capacity.

The average capacity of 41 cars shipped via the Illinois Central road in the years 1891-3 was 43,660 pounds per car and the average loading was 32,719, 75 per cent of the loading capacity.

In the case of green lumber the loading in open cars is sometimes larger than the stenciled capacity of the car. For example, the average loading capacity of 20 open cars shipped from Fernwood, Miss., from March 17 to April 14, 1903, was 74,500 pounds per car and the average loading was 76,320 pounds, being 102 per cent of the loading capacity.

The following table gives the car capacity and actual loading of certain commodities named therein, other than yellow pine lumber:

	No. of cars.	Loading. (Pounds.)	Car capacity. (Pounds.)	Loading percentage of car capacity.
Cypress lumber	17	595,100	738,000	81.11
Oak lumber	8	384,450	490,000	78.47
Cypress shingles	17	716,600	1,060,000	67.75
Sash weights	6	253,868	400,000	63.38
Window glass	9	433,800	610,000	71.00
Cement	20	780,750	1,170,000	66.70
Lime	15	379,400	846,000	44.32
Fertilizer	27	1,089,200	1,630,000	66.79
Cotton seed meal	8	250,000	450,000	55.00
Cotton seed hulls....	38	1,047,400	2,223,000	47.00
Live stock	6	138,240	340,000	40.60
Furniture	3	39,800	180,000	22.11
Coal	4	241,700	270,000	89.50
	178	6,350,308	10,412,000	.....

The above shipments were for the most part over the roads of defendants in 1903.

Lumber shippers make requisitions for cars of certain capacities in order to meet the different orders which are made upon them. When, because of scarcity of equipment, they have not a car of the capacity ordered, the carriers frequently furnish a car of greater capacity. This necessitates underloading on the part of the shipper. For example, a requisition is made for a car of 40,000 pounds capacity to fill an order for that amount of lumber and a 60,000 pounds car is furnished.

20. The tonnage of lumber hauled by the defendants and other roads throughout the United States is very large in proportion to that of other commodities of general use and necessity. From the table below, made up from reports of the roads to the Commission, it appears that the tonnage of lumber transported during the year 1901 was greater than that of all the commodities named therein except bituminous and anthracite coal, and during 1902 and 1903 greater than that of all except bituminous coal.

Item.	1901.	1902.	1903.
	Total freight tonnage, originating on road and received from connections. (Tons.)	Total freight tonnage, originating on road and received from connections. (Tons.)	Total freight tonnage, originating on road and received from connections. (Tons.)
Grain	66,252,712	52,257,455	60,484,068
Fruit and vegetables	14,508,551	14,501,968	17,033,868
Live stock	15,667,146	15,477,500	16,460,788
Packing-house products	10,965,039	10,596,670	10,520,098
Anthracite coal	97,472,509	83,720,175	68,350,635
Bituminous coal	223,965,320	255,792,615	289,173,392
Agricultural implements	2,067,739	2,445,955	2,400,600
Household goods and furniture	2,271,990	2,661,909	2,961,648
Cement, brick and lime	23,637,929	28,815,418	33,351,274
Iron, pig and bloom	22,798,053	28,520,310	32,017,786
Iron and Steel rails	7,479,830	10,101,091	10,700,602
Merchandise	43,468,315	47,015,216	55,898,707
Lumber	78,729,180	88,653,853	97,846,984

Lumber is a constant business for the roads throughout the year; it is loaded by the shipper and unloaded by the con-

signce; it is not perishable traffic, and, therefore, does not require rapidity of movement; there is little or no risk incident to its carriage and in case of accident the damage is insignificant.

CONCLUSIONS.

1. The question in this case is whether the advance of 2 cents in the rate, effective April 15, 1903, and made applicable south of the Ohio, was justifiable. Prior to the advance, from September 9, 1899, to the date of the advance, nearly four years, the rate to Cairo had been 14 cents and the advance complained of raised it to 16 cents. From September 9, 1899, back to May 1, 1894, a period of five years and four months, the rate had been 13 cents, 3 cents less than the advanced rate. When carriers advance a rate which has been for some time in force, the burden of proof is upon them to show sufficient grounds for such advance. (*Holmes v. Southern Ry. Co.* 8 I. C. C. R. 568.) The defendants, recognizing this, seek to justify the advance, first, on the ground that the yellow pine industry was enjoying great prosperity, "that" (in the language of their answer) "profits heretofore and now derived from the mills * * * are unusual and excessively large," and that they (the defendants) had a right to participate in this alleged prosperity.

It is true the lumber business has grown from its inception and was at the date of the advance larger and possibly more prosperous than it had been, but the proof does not show that for the two or three years preceding the advance the prices of the mill products had been materially increased or that the profits realized on the business were "unusual or excessively large." (Conceding, however, for argument's sake, that the lumber business had at the date of the advance become phenomenally prosperous and remunerative, this could not justify an advance of a rate already reasonably high.

The test of the reasonableness of a rate is not the amount of the profit in the business of a shipper or manufacturer, but whether the rate yields a reasonable compensation for the service rendered. If the prosperity of the manufacturer is to have a controlling influence, this would justify a higher rate on the 10 I. C. C. REP.

traffic of the prosperous manufacturer than on that of one less prosperous. The right to participate in the prosperity of a shipper *by raising rates* is simply a license to the carrier to appropriate that prosperity or, in other words, to transfer the shipper's legitimate profit in his business from the shipper to the carrier. The increased prosperity of shippers along the line of a railway enlarges the business of those shippers and, as a consequence, both the tonnage of traffic which they receive in their business and which they ship to their customers. In this way the carrier necessarily and justly participates in, or is benefited by, the prosperity of the shipper. This appears to be the case with these defendants as the tonnage of lumber shipped by complainant's members over defendant's lines and the revenue of defendants therefrom have constantly grown in amount.

The question as to the right of a carrier to participate in the prosperity of its patrons was presented to this Commission in "*In re Proposed Advances in Freight Rates*," 9 I. C. C. R. 405, and in discussing it, we said:

"Carriers insist that inasmuch as the prices of articles transported have advanced the rate ought also to advance; otherwise expressed that they should share in the general prosperity.

"While within the last four years the prices of nearly all commodities of general consumption have materially risen, the freight rate has not advanced to a corresponding extent. If therefore that rate is to be treated as an article of merchandise, it is difficult to see why the position of the carriers is not well taken. It is not, however, properly so regarded. Transportation by rail is a service of a quasi-public nature, not to be sold to the highest bidder, nor subject to the law of supply and demand. This sufficiently appears from the provisions of the Act regulating commerce, which requires the same rate to be charged all persons and enjoins the publication of that rate.")

2. In the next place, it is claimed in justification of the advance in the rate that it was rendered necessary by increases in the operating expenses of the defendants resulting from higher wages paid their employees and higher prices of the material and equipment used by them. The proof shows increases in wages

and in prices of material and equipment but not in a marked degree for the two years, 1901 and 1902, immediately preceding the advance in rate. These increases have doubtless added materially to operating expenses, but the total annual increases in those expenses are, of course, due only in part to the advances in wages and prices of supplies and equipment. They are attributable in a great measure to the constant growth or enlargement of the business of the roads. Not only has the lumber business of the roads greatly increased, but their business in general. The greater the volume of business, the greater is the aggregate cost of conducting it, or, in other words, of operating the roads. The total operating expenses of the roads, as reported by them, have also been much enlarged by the inclusion therein of large expenditures for permanent improvements.

It is to be borne in mind in this connection that the operating expenses of the *mill companies* in the matter of wages and supplies required in the manufacture of lumber have also grown. These supplies are largely the same as those used by the defendant railways, and it is estimated that for the years, 1902-1903, the cost of the manufacture of lumber had increased about 10 per cent.

While the operating expenses of the defendants have constantly grown, the gross earnings from operation have also increased from year to year to such an extent as to have resulted in a constant increase of net earnings. This is shown in the tables set forth in our findings of fact (finding 14).

3. We do not think sufficient cause is shown, either in the alleged large profit in the lumber business or in the increased cost of operating the roads, for the advance in the rate on lumber. (But it is further contended in behalf of the defendants that lumber, considering its character and all the conditions incident to the services rendered in its transportation, was not, at the 14-cent rate in force at the date of the advance, yielding its proper proportion of the revenue required by the defendants to meet their expenses—in other words, that that rate as applied to lumber was not a reasonable rate, viewed from the carrier's standpoint, in that it was not adequately remunerative.

10 I. C. C. REP.

The question of the reasonableness in this sense of a rate *on a single article* of traffic is one of almost insuperable difficulty.

In *Smyth v. Ames (Nebraska Freight Rate Case*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418), there was involved an entire system of rates applicable to all traffic on the roads in the State of Nebraska and not the rate on a single commodity or article of traffic. In that case the Supreme Court held that the carrier is entitled to earn "a fair return upon the value of that which it employs for the public convenience."

The value of the entire property of a road employed for the public convenience can shed but little, if any, light upon the question whether the rate on a single among thousands of articles of traffic yields its proper proportion of a fair return on that value. The rate on one article of traffic may be reasonably high and the carrier fail to earn a fair return on the value of the entire property employed for the public convenience because of unreasonably low rates on other traffic, and, *vice versa*, the rate on one article of traffic may be unremunerative or unreasonably low and the return to the carrier from its entire business may be fair or reasonably high, the deficiency under the rate on the one article of traffic being made up by the rates on the balance of the traffic.)

Even, however, if we be mistaken in this, it is impossible with any degree of accuracy to determine from the voluminous and conflicting testimony on the subject introduced in behalf of both parties in this case, what is the value of the property employed by the defendants for the public convenience. At the outset of an investigation of this question, in the case of a through rate participated in by a number of connecting carriers, it must be determined whether the basis is to be the aggregate value of that which all the parties to the rate employ for the public convenience or the values separately of that which each of them so employs. The value of the property used by each road in the public service differs materially and also the cost of operation; therefore, what would be a fair rate or return for one would not be for another and a fair return upon the aggregate value of the property of all the roads might, and probably would be, unfair to some, if not all, of them individually.

In "*In re Proposed Advances in Freight Rates*," *supra*, in which this matter was involved, the Commission says:

"But what is the value of a railway? Does not that value depend almost wholly upon the rate which it is permitted to charge? If the rates upon a railway system are reduced without thereby stimulating the movement of traffic the value of the property is diminished. If its rates are advanced without loss of traffic the value of its property is increased. Stated in another way; the value of a railway depends upon what it can earn on the basis of a reasonable rate; and the reasonableness of a rate depends upon the return which it will yield upon the value of the property.

"The court" (in the *Nebraska Freight Rate Case*, *supra*), "pointed out certain elements which should be taken into account in determining the reasonableness of rates, and these were 'the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses.' The court added that there might be other matters proper to be regarded in estimating the value of the property, and did not indicate the relative importance which was to be assigned to the various matters specified. *It is plain that until there be fixed, either by legislative enactment or judicial interpretation, some definite basis for the valuation of railroad property, and some limit up to which that property shall be allowed to earn upon that valuation, there can be no exact determination of these questions. In the absence of such a standard the tribunal, whether court or Commission, which is called upon to consider this matter can only upon the whole exercise its best judgment.*"

4. While the Supreme Court has undertaken to point out "certain elements" to be considered in determining the reasonableness of an entire system of rates, it has not named any as shedding light upon the reasonableness of a rate on a single commodity like lumber. It is evident that such elements are widely variant in the two cases. Where an entire system of

10 I. C. C. REP.

rates is involved, the principal, if not the only question, is, whether the revenue yielded by the rates on all traffic is a fair return on the value of that which is "employed for the public convenience"—a question, the determination of which, as we have shown, can have only a very remote, if any practical, bearing on the reasonableness of a rate on a single article of traffic. On the other hand, where the rate on a single article is in issue, the question (which could not arise in the former case), whether the rate is unjustly discriminatory or unduly preferential, may be presented, and the reasonableness of the rate depends upon the value, volume and other characteristics affecting the transportation of the particular commodity to which it is applied. There are many things disclosed by the evidence and set forth in our "Findings of Facts," which bear directly upon the reasonableness of the particular rate in question in this case (and not upon the rates as a whole of the defendants) and which aid us in arriving at a correct judgment in respect thereto.

5. In the first place, the present advanced rate is the last (up to date) of a series of advances and was made by joint or concerted action of the carriers. It is claimed by them that in advancing the rate, they acted independently, each for itself, but the proof shows conclusively that the advance was the outcome of a concert of action and a previous understanding between the companies. Through their authorized official representatives they conferred with each other repeatedly as to the making of an advance; recognized the fact that, because of competition in common markets between the lumber producing districts served by them, the advance should be from all those districts or none, and finally they all promulgated the advance to take effect at exactly the same time and for exactly the same amount. This concurrence of action was not only between the railway companies, parties defendant in this case, and in relation to the rates charged by them, but was participated in by the lumber hauling roads serving the territories west as well as east of the Mississippi River.

We deem it unnecessary to express an opinion as to whether this concert of action in fixing the advanced rate amounts to

an unlawful agreement under the so-called "Anti-Trust Act"—the enforcement of that act being a matter properly cognizable by the courts. It is clearly, however, within the scope of our authority and duty to consider this joint or concerted action of the defendants in the aspect of its bearing upon the reasonableness and validity of the advanced rate, the result of that action. Where rates are established by concert of action and previous understanding between the carriers, it is manifest, whether or not there be a binding agreement to maintain such rates, that the element of competition is eliminated. Concert of action is wholly inconsistent with competition and, during the time the rates fixed by concert of action are maintained, the effect, so far as competition is concerned, is the same as if there was a binding agreement to maintain such rates.

Competition is favored by the laws. The object of the pooling section (Section 5) of the Interstate Commerce Act is to prevent "any contract, agreement, or combination" between otherwise competing carriers by which competition between them may be done away with.) In *East Tenn., Va. & Ga. Railway Co. v. Interstate Commerce Commission*, it is said, "The Interstate Commerce Law, it is conceded, was intended to encourage normal competition. It forbids pooling for the very purpose of allowing competition to have effect." (99 Fed. Rep. 61). The Supreme Court holds that the suppression of competition is violative of the so-called "Anti-Trust Act," in that, such suppression restrains trade and commerce by "keeping rates and charges higher than they might otherwise be under the laws of competition." (*Joint Traffic Association Case*, 171 U. S. 569, 571, 577, 43 L. ed. 287, 288, 290, 19 Sup. Ct. Rep. 25; *U. S. v. Freight Association*, 166 U. S. 341, 41 L. ed. 1027, 17 Sup. Ct. Rep. 540.)

The ground upon which competition is favored is that it conduces to the reasonableness of rates or to the protection of the public from unreasonably high or excessive rates. In *United States v. Freight Association*, *supra*, the Supreme Court says, "competition will itself bring charges down to what may be reasonable" (166 U. S. 339, 41 L. ed. 1027, 17 Sup. Ct. Rep. 540). The Act to regulate commerce (section 1), in pro-
10 I. C. C. REP.

hibiting unreasonableness of rates, in effect forbids whatever conduces to such unreasonableness. In any event, it is incumbent upon this Commission, when the reasonableness of rates is in issue before it, to consider how those rates were brought about—whether they are the product of untrammelled competition or the result of a concert of action or combination between the carriers establishing and maintaining them. The advanced rates complained of cannot be claimed to be the outcome of competition, because “the natural, direct and immediate effect of competition is to lower” (171 U. S. 577, 43 L. ed. 290, 19 Sup. Ct. Rep. 25), rather than advance, rates. The advanced rates must be presumed to be higher than rates which unrestrained competition would produce.

6. As we have seen, the 14-cent rate in force at the date of the advance had been maintained nearly four years and a still lower rate, 13 cents, had been maintained for the preceding five years and four months. “The continuance of a given rate is not conclusive evidence of the reasonableness of that rate; but when a railway company advances a rate which has been for some time in force, the fact of its continuance is *in the nature of an admission* against that company which tends to show the unreasonableness of the advance.” (*Holmes v. Southern Ry. Co., supra.*) In addition to this *quasi* admission, we have the testimony of the officers of the defendants that there was a profit to the defendants in the lumber traffic while the 13-cent rate was in force and also a profit while the 14-cent rate was in force. The defendants in their answer say, “Respondents admit that under previously existing rates lumber was carried at a profit, but respondents aver that it *was not an exceedingly profitable commodity.*” No reason is given or shown why lumber should be singled out as a commodity upon which an “exceedingly” large profit should be earned. A reasonable profit is all the defendants are entitled to and the testimony is far from convincing us that the profit under the 14-cent rate was not reasonable or would not now be reasonable. As stated in our “Findings of Facts,” the 14-cent rate appears to be reasonably high when compared with the rates on other commodities which are at all analogous to lumber in respect to value, volume and

the various conditions affecting the service of transportation. During the period from 1894 to 1899, while the 13-cent rate was operative, there were large annual increases in the net earnings of the defendants and the same was the case from 1899 to 1903 while the 14-cent rate was operative (Finding 15). During those periods there was also a large growth in the tonnage of lumber hauled by the defendants and, therefore, their increases in net earnings were in part, at least, derived from the lumber traffic under those rates. Dividends have been declared during those periods and in addition considerable surpluses have been reported (Finding 16) and large sums have been invested in permanent improvements or betterments (Finding 14).

7. The defendants, other than the originating roads, complain of the small amount of revenue or low rate per ton per mile realized by them out of their proportions of the through rates. This is due to the large allowances out of the rates made to the originating roads. (See Findings 3 and 4.) Those allowances commenced under the lower rates in force prior to the advance and raise the presumption that those lower rates minus the allowances were then considered reasonably remunerative for the remainder of the hauls to the Ohio River crossings. As the 2 cents advance goes entirely to the roads continuing the transportation on to the Ohio and more of it to the originating roads, the inference is that advance was made solely with a view of increasing the proportions of the former roads. If the allowances to the originating roads are unreasonably large, as they appear to be from a distance standpoint, and result in unreasonably low proportions to the other roads, this can not be remedied by an advance in the total through rates *charged the public*. It is the total rate, and not its proportions, which is in issue.

8. Although both the net and gross earnings of the defendants have grown from year to year, the percentages of what are reported by the defendants as "operating expenses" to earnings have also somewhat increased (Table, finding 14), and this is urged as showing the necessity for an advance in the lumber and some other rates. It is to be noted, that these operating

10 I. C. C. REP.

expenses embrace large annual expenditures for real estate, right of way, tunnels, bridges and other strictly permanent improvements and also for equipment, such as locomotives and cars (Finding 14). While payments for repairs, whether applied to permanent improvements or equipment, are properly chargeable to current annual operating expenses, this would not appear to be the case as to the improvements or equipment themselves—the former being permanent and the latter lasting for many years. The expenditures for permanent improvements and for equipment made in a single year may obviate the necessity for like expenditures or expenditures to the same extent for many years to come and the extraordinary amount of such expenditures made by the defendants in a few years preceding and including the year of the advance in rate indicates that they will not be required again for a long period of time. They should not, therefore, be taxed as part of the current or operating expenses of a single year, but should be, so far as practicable and so far as rates exacted from the public are concerned, “projected proportionately over the future.” If these large amounts are deducted from the annual operating expenses reported by the defendants, it will be found that the percentage of operating expenses to earnings has in some instances diminished and in others increased to no material extent.

9. The published rate to Cairo in the territory west of the Mississippi River, embracing that part of Louisiana west of the river, Arkansas and Texas, is the same as the published rate from the territory east of the Mississippi served by the defendants, but, the roads in the former territory make an allowance called a “tap line allowance” to the millers of 2 cents and over per hundred pounds for the hauling by their “logging roads” of the lumber from the forests to the mills. This is equivalent to a rebate or reduction from the published rate. Of the defendants, only the Mobile & Ohio makes such allowance. The giving of this rebate by that road and by the roads west of the Mississippi is in the nature of an admission, or raises a strong presumption, that the published rate less the rebate is a reasonably remunerative rate. The rebate was allowed by the Mo-

10 I. C. C. REP.

Mobile & Ohio and roads west of the Mississippi under the rate in force at and prior to the date of the advance, April 15, 1903.

The question, whether allowances from the published rate made by the roads west of the Mississippi to logging roads or "tap lines," as they are called, owned or controlled by the lumber mills, constituted departures from such published rate in violation of the Act to regulate commerce as amended February 19, 1903, was presented for decision by this Commission in the case of *The Central Yellow Pine Association* (complainant in the present case) v. *The Vicksburg, Shreveport & Pacific Railroad Co.* (10 I. C. C. R. 193), and it was held, that the published rate must be strictly observed; that the defendants were not authorized under the law "to grant a division of the rate to the owner of a lumber mill as compensation to him for the cost of bringing his logs to the mill by steam railroad, horse railroad, wagon, or any other means of conveyance;" and that a common carrier subject to the provisions of the Act to regulate commerce can "allow a division of rates *only to another* common carrier which, participating in the particular traffic to which the rate is applied, *is also subject to those provisions.*" Where both roads are common carriers, it is said "the two lines may by contract or agreement establish a joint rate from the point of origin on the one road to the point of destination on the other and agree between themselves as to divisions of the rate;" and further that, "treating the transportation, first of the log to the mill and then of the lumber to destination, as a through shipment, involves the *right to mill in transit*, and, when that privilege is granted, the tariff should show on its face that the transportation covers carriage of the log to and the lumber from the mill and the division allowed the carrier of the log should be named in all cases."

The logging roads or "tap lines," to the owners of which the Mobile & Ohio road makes allowances out of the published rate from the mills to destinations, do not appear to be common carriers, or carriers for the public, subject to the provisions of the Act to regulate commerce, but the private property of the mill owners used for hauling logs to their mills. Those allowances

10 I. C. C. REP.—35.

are, therefore, unlawful under the rule laid down in the above decision.

The facts, that the roads west of the Mississippi make tap line allowances to mill-owners in their territory and the defendants (with the exception of the Mobile & Ohio road) do not make such allowances to the mill owners in their territory east of the Mississippi and that this results in placing the latter at a disadvantage in the common markets, does not constitute an undue preference for which the defendants in this case are liable under the Act to regulate commerce. The third section of that Act, which prohibits undue preferences between individuals and localities, is not violated by the failure or refusal of the defendants to make tap line allowances to the mill owners in their territory while such allowances are granted the mill owners by other carriers in a different territory or section of the country. (*Central Yellow Pine Association v. Vicksburg, Shreveport & Pacific R. Co., supra*). While, however, this is true, there does not appear to be any reason for making these allowances west of the Mississippi River which does not equally apply east of the river and, if the rate west of the river is reasonable *minus* the allowances, this is persuasive, or gives color to the proposition, that after a similar reduction the rates east of the river would still be reasonably high. The Mobile & Ohio road by voluntarily making the allowance east of the river practically concedes this proposition as to itself.

10. The general rule is, the greater the tonnage of an article of traffic, the lower is the rate. No rule is more firmly grounded in reason or more universally recognized by carriers. It is because of the greater density of traffic north of the Ohio River in Central Freight Association Territory and in Eastern Territory that rates in general are materially lower in those territories than in Southern Territory. The defendants have made yellow pine lumber an exception to this rule; while the *tonnage* in general of the defendants and lumber tonnage in particular have grown greatly, the lumber rate has not been lowered but has been materially advanced. Moreover, the testimony is that "a decrease in the rates on traffic in general has been going on throughout the United States since the improve-

ments in transportation have been put in operation;" here, again, lumber has been taken from under, and deprived of the benefit of, the general rule.)

11. As said in *Marten v. L. & N. R. R. Co.* (9 I. C. C. R. 589) and shown by the proof in this case, "lumber is an inexpensive freight and only a few other commodities furnish to carriers so large a tonnage." (The lumber business is constant, yielding the carriers revenue all the year; no special equipment is constructed or furnished for its carriage; it is loaded by the shipper and unloaded by the consignee, and where open cars are furnished, the shipper is required at considerable expense to equip them so as to protect the load and the train; there is small risk incident to its transportation and, in case of accident, the damage is insignificant. For these reasons lumber should be given rates which are relatively low.)

Our conclusion on the whole is that the advance, April 15, 1903, of 2 cents in the Cairo rate (with a corresponding increase in the rates to the other Ohio River crossings) was not warranted under all the facts in evidence and that the resultant increased rate is unreasonable and unjust. An order will be issued in accordance with these views.

KNAPP, *Chairman*, and FIFER, *Commissioner*, dissenting:

In the view we take of this case the conclusions of our associates are not justified by the facts and circumstances appearing in the record or otherwise entitled to consideration. Holding that the rates complained of have not been shown to be in violation of law we respectfully dissent from the foregoing report and opinion.

10 I. C. C. REP.

No. 698.

H. H. TIFT, W. S. WEST, J. LEE ENSIGN, J. S. BETTS
& COMPANY, GARBUTT LUMBER COMPANY,
ALAPAHA LUMBER COMPANY AND SOUTHERN
PINE COMPANY

v.

SOUTHERN RAILWAY COMPANY; ATLANTIC
COAST LINE RAILROAD COMPANY; LOUIS-
VILLE & NASHVILLE RAILROAD COMPANY;
NASHVILLE, CHATTANOOGA & ST. LOUIS RAIL-
WAY COMPANY; SEABOARD AIR LINE RAIL-
WAY; CENTRAL OF GEORGIA RAILWAY COM-
PANY; GEORGIA SOUTHERN & FLORIDA RAIL-
WAY COMPANY; MACON & BIRMINGHAM RAIL-
WAY COMPANY; AND THE SOUTHEASTERN
FREIGHT ASSOCIATION AND S. F. PARROTT,
CHAIRMAN OF SAID SOUTHEASTERN FREIGHT AS-
SOCIATION.

Decided February 7, 1905.

Defendants made effective on June 22, 1903, an advance of 2 cents per 100 pounds over rates previously in effect from Georgia points to Ohio River destinations on lumber in carloads, whether shipped locally to said Ohio River points or shipped beyond. The rates prior to that date were in effect from September 8, 1899, on which date an advance was made of 1 cent from Group 2 points on the Southern Railway, and of 2 cents from most other grouped shipping points in Georgia, over rates in force May 17, 1894. From the various groups the present advanced rates to Cincinnati, Louisville and Evansville are, as to some, 4 cents higher than in 1892, and as to others, 3 cents higher than in 1891. The rates prior to the advance complained of were remunerative to the carriers. *Held:—*

1. That complainants, constituting only a small portion of the
10 I. C. C. REP.

membership of the Georgia Saw Mill Association, which is alleged by defendants to be an unlawful association, were entitled to bring and maintain this proceeding in their own behalf and in the interest of all shippers of the traffic involved and others constituting the public at large.

2. That the advance of rates complained of in this case was the result of concerted action by defendants and other carriers; and while the question whether such concert of action is in violation of the "Anti-Trust Act" is for determination only by the courts, it is the province and duty of this Commission, when the reasonableness of rates is in issue before it, to consider whether the advanced rates resulted from untrammelled competition, or were fixed by concert of action or combination of the carriers.

3. That where an advance is made in rates which have been long maintained, and the evidence shows that the traffic affected is large, important, and constantly increasing, the advance will be held unjust, unless it is satisfactorily explained.

4. That the test of the reasonableness of a rate is not the amount of profit in the business of the shipper or manufacturer, but whether the rate yields a reasonable compensation for the services performed. Carriers necessarily and justly participate in the prosperity of their patrons in the resultant enlargement of their own business, and no rule is more firmly grounded in reason, or more universally recognized by carriers, than that the greater the tonnage of the article transported, the lower should be the rate.

5. That if permanent improvements are not included in the operating expenses of defendants, and if only such expenditures for equipment as are properly chargeable to a single year are included, the percentages of operating expenses to gross earnings will be materially reduced.

6. That carriers have no right to advance a rate which is already reasonably high and which yields an adequate return for the service rendered, solely because additional revenue is needed. The mere fact of the need of additional revenue to meet increased expenses does not justify the advance in rates on these lumber shipments from Georgia to and beyond the Ohio River, which are, for the most part, of low grade and comparatively small value.

7. That the hauling of flat cars empty to the mills, or the practice of shippers to load cars below their capacity, are conditions which, to the extent they exist, are properly taken into account by carriers in fixing rates; and it must be assumed that they were considered by defendants in making and maintaining the rates so long in force prior to the advance herein charged.

8. That the rates on lumber, prior to the advance complained of, were reasonably high when compared with the rates on other commodities which are at all analogous to lumber in respect to value, vol-

ume, risk, cost of handling, and other circumstances and conditions affecting the transportation of the traffic.

9. That lumber rates should be relatively low, in view of the limited life of the lumber business in Georgia, at the end of which large investments of manufacturers in plants, including buildings, machinery and tram roads, will become practically valueless, the increase in the net revenue of the roads caused by the lumber traffic, the fact that lumber is inexpensive freight and few other commodities furnish greater tonnage, the constancy of the traffic throughout the year, the fact that no special equipment is required for its movement, that it is loaded by shippers and unloaded by consignees, that when flat or open cars are furnished the shipper is at considerable expense to equip them so as to protect the lumber and the train, that it is not a perishable freight and does not require rapidity of movement, that there is small risk and in case of accident the damage is insignificant, and that lumber is an article of general utility.

10. That the advance of 2 cents per 100 pounds in defendants' rates on lumber from Georgia shipping points to Ohio River points, which was made effective June 22, 1903, was not warranted by the facts, circumstances and conditions disclosed in this case, and that the increased rates then put in force are unreasonable and unjust.

Ellis, Wimbish & Ellis and *F. G. Boatright* for complainants.

Ed. Baxter for Southern Railway Company, Atlantic Coast Line Railroad Company, Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway Company, Seaboard Air Line Railway, Central of Georgia Railway Company, Georgia Southern & Florida Railway Company, Macon & Birmingham Railway Company.

C. B. Northrop for Southern Railway Company.

Mason, Hill & McGill for Southeastern Freight Association.

Kaye, Bennett & Conyers for Atlantic Coast Line Railroad Company.

Brown & Randolph and *Erwin & Erwin* for Seaboard Air Line Railway.

REPORT AND OPINION OF THE COMMISSION.

CLEMENTS, *Commissioner*:

The complainants, H. H. Tift, et al., are manufacturers of
10 I. C. C. REP.

yellow pine lumber in the State of Georgia. They describe themselves in the complaint as members of the Georgia Saw Mill Association, and allege that the complaint is filed "in behalf of themselves and all members of that Association," but the association as such is not made a party complainant. It is an organization composed of complainants and a large number of other lumber manufacturers in the States of Georgia, Florida and South Carolina, created, it is alleged, for the purpose of "promoting and protecting the interests of the yellow pine industry" of those states.

The defendants, except the Southeastern Freight Association, are common carriers engaged in the transportation, among other things, of lumber from points in the State of Georgia to points in other states—particularly, the States of Tennessee, Kentucky, Ohio, Indiana, Illinois and Missouri. The defendants conduct this transportation over their own lines or in connection with other common carriers of interstate commerce and each of them maintains and operates a line in the State of Georgia. The line in Georgia with which defendant, the Louisville & Nashville Railroad Company, is connected, is the Georgia Railroad, which it maintains and operates as co-lessee with defendant, the Atlantic Coast Line Railroad Company.

Defendant, the Southeastern Freight Association, is an association or organization composed of a large number of common carriers by rail and water, embracing as members all the other defendants herein except the Nashville, Chattanooga & St. Louis Railway Company and the Louisville & Nashville Railroad Company. The latter company, however, is practically a member in its character as co-lessee of the Georgia Railroad. What is termed the "territory" of this Association lies, roughly speaking, south of the Potomac River and east of a line extending from Chattanooga via Birmingham, Selma and Montgomery to Pensacola. Its object is the promotion and protection of the interests of its members, and, particularly, in the matter of rates.

As grounds of complaint, it is alleged:

1. That said Southeastern Freight Association "was organized under and is maintained under agreements and for pur-
- 10 I. C. C. RER.

poses, including the fixing and maintenance of rates, fares and charges on competitive traffic, which result in the fostering of monopoly and the destruction of fair competition between the carriers embraced in its membership and in establishing and continuing in force unreasonable and unjust transportation rates and charges upon traffic carried over the lines of such common carriers, to the injury and prejudice of complainants and other members of said Georgia Saw Mill Association and the localities wherein they are engaged in business;" that said Association "is employed by the defendant railway companies and other carriers, members of said Association, as an irresponsible medium through and by which to effect the lessening of competition in transportation rates and facilities and the exaction of higher transportation charges than will be in effect under conditions of unrestricted competition between the defendant railway companies;" and that in the matter of the increased rates complained of in this case, "the lumber carrying roads, defendants herein, have acted in concert and have acted through said Southeastern Freight Association, and have singled out lumber as a commodity upon which this extra burden shall be laid, notwithstanding that some, if not all, the railway companies would derive an equal and apparently much greater benefit from the laying of increased rates upon other products."

2. That on the 22nd day of June, 1903, each of the defendants put in force an advance of 2 cents per hundred pounds in the rates on lumber from points of shipment in the State of Georgia to Chattanooga, Tenn., and to points on the Ohio River, namely, Cincinnati, Evansville, Henderson, Louisville, East St. Louis and St. Louis and to points beyond; that "in promulgating said tariff of increased rates and maintaining and enforcing the same without change, the several defendant railway companies have been and are acting in concert with each other and with other lumber carrying roads, who with them are co-members of the Southeastern Freight Association;" that said advance in rates "is arbitrary, unreasonable and unjust and has proved destructive to the business of complainants and other members of said Georgia Saw Mill Association and defeats competition within a large territory comprised of Ohio

10 I. C. C. REP.

River points and points beyond in the Central, Northern and Western states"; that said advance imposes upon the yellow pine industry "a burden out of line with and far more grievous than that sustained by the products of other industries of like weight and value and subjects complainants and other members of said Georgia Saw Mill Association, their traffic and the localities wherein they do business, to an undue and unreasonable prejudice and disadvantage."

The prayer of the complaint is that "an order or orders be issued commanding the defendants, and each of them, to wholly cease and desist from each and every of the alleged violations of the Act to regulate commerce, and, particularly, from continuing to exact and enforce the advanced rates complained of, and for such other and further order or orders as the Commission may deem necessary in the premises or complainants' cause may appear to require."

The defendants, with the exception of the Macon & Birmingham Railway Company, have filed a joint and several answer in which they deny specifically all the charges made in the complaint and allege "that the circumstances and conditions now affecting the lumber traffic fully justify respondents and their connections in making the 2 cents advance in rates and that said advance is just and reasonable." They set up as "circumstances and conditions" justifying the advance, (1) that the lumber rates, "value and tonnage considered are low as compared with the rates on other commodities produced in South Carolina, South Georgia and Florida and shipped to north-central and western states, such as oranges, pineapples, watermelons, peaches, other fruit, rosin, turpentine and pyroligneous products;" (2) that for the transportation of lumber they are compelled to haul a large number of flat cars to the mills *empty* and consequently the rates charged "represent a transportation service rendered in carrying the empty cars to the mills, as well as a transportation service rendered in carrying the loaded cars from the mills to the north-central and western territory;" (3) and that "it is a common practice for shippers of lumber to load the cars below their marked capacity, the result of which is to

10 I. C. C. REP.

deprive the carriers of the additional revenue which they would obtain if the cars were loaded to their full capacity."

It is also averred that if the advance is not allowed to stand, the defendants will be debarred "from sharing to any extent whatever in the phenomenal prosperity of the business in the regular grades of lumber." These are the principal matters set up in the answer in justification of the advance; others are presented in the testimony and will receive due consideration.

In addition to denials of all charges in the complaint and to matters of justification, the answer charges that the Georgia Saw Mill Association—of which, as before stated, the complainants and a large number of others are members, but which is not made a party complainant in this proceeding—was not organized and is not maintained "for promoting or protecting by proper and lawful means the interest of the yellow pine industry in Georgia, South Carolina, Florida and Alabama," but that, on the contrary, complainants and the other members of said Association "have combined and conspired with each other to monopolize a part of the trade and commerce in yellow pine lumber among the several states of the United States;" that the constitution and by-laws of said Association "constitute a contract, combination in the forms of a trust or otherwise, or conspiracy between the members of said Association for the sale and transportation to other states of the United States of the yellow pine lumber manufactured by the members of said Association in Georgia, South Carolina, Florida and Alabama; that the natural and direct effect of said constitution and by-laws is to regulate and restrain interstate commerce in the yellow pine lumber manufactured by the members of said Association; that complainants and the other members of said Association are acting in violation of the Act of Congress of July 2, 1890, known as the Anti-Trust Act, and, therefore, "complainants do not come before the Commission with clean hands and should not be allowed to maintain their bill of complaint in this case."

FINDINGS OF FACT.

1. The advance of 2 cents per hundred pounds in the lumber rates from Georgia, complained of in this case, was originally

promulgated by the defendants to take effect April 15, 1903, and would have become operative at that date but for a temporary injunction or restraining order granted April 14, 1903, by the Circuit Court of the United States for the Southern District of Georgia in the case before that court of the complainants herein, H. H. Tift, et al., v. defendants herein, the Southern Railway Company, et al. (123 Fed. Rep. 789). Subsequently, on the 16th day of May, 1903, the Circuit Court dissolved the temporary injunction and "withheld further judicial action until apprised" of the decision of this Commission in the present proceeding (ib. 796), and on the 22nd day of June, 1903, the defendant railways after due notice put in force the advanced rates on shipments from Georgia points as originally proposed.

An advance of 2 cents was made April 15, 1903, from both the territory west of the Mississippi, composed of Louisiana west of that river, Arkansas and Texas, and the territory east of the river composed of East Louisiana, Mississippi, Alabama and Florida, and would, as above stated, have been put in force at the same date from Georgia but for the delay caused by the temporary injunction referred to in the preceding paragraph. It was intended to be simultaneous all along the line and was made, in fact, though not expressly, by agreement between the roads, including the defendants, serving the different lumber producing districts. A number of meetings were held and consultations had between the representatives of the roads which resulted finally in the promulgation of the advance. The lumber manufacturers in all these territories compete for business largely in the same markets and the increase in rates was understood to be impracticable or inadvisable unless made from all the lumber producing territories and, consequently, there was a concurrence or agreement between the roads before the advance was finally determined upon and made effective. Defendant, the Southern Railway Company, appears to have taken the initiative in this matter.

The principal points to which the advance was made applicable are Chattanooga and the Mississippi River points, St. Louis, East St. Louis and other crossings from St. Louis to and in-

10 I. C. C. REP.

cluding Memphis, and all Ohio River crossings from Cairo to Cincinnati, both inclusive. The rates to the Ohio River crossings, Evansville, Louisville and Cincinnati, are based on the Cairo rate, that is, they bear a relation to the Cairo rate, being higher by certain amounts than the Cairo rate and being as a rule correspondingly advanced or reduced as the Cairo rate is advanced or reduced. The through rates to points beyond in the territory east of the Mississippi and north of the Ohio River, known as the "Central Freight Association Territory," are made up of the full local rates of the roads north of the Ohio (which are not affected by the advance) as the proportions of those roads, and of whatever is left of the through rates as the proportions of the roads south of the Ohio. It results that the proportions of the latter roads are in some cases less than their regular local rates to the Ohio River.

2. Defendants, the Southern Railway Company, the Georgia Southern & Florida Railway Company, the Central of Georgia Railway Company and the Atlantic Coast Line Railroad Company, have, for the purpose of fixing lumber rates from Georgia, divided the shipping stations on their lines in that state into different Groups or Rate Bases, and the rates from these Groups or Bases differ, being higher from some than others.

The advanced rates from the different Groups or Rate Bases of these four roads to the Ohio River crossings, Cairo, Evansville, Louisville and Cincinnati, are shown in the tables below:

TABLE I.

Rates in cents per 100 pounds of Southern Railway Company.						
To —	Rate Bases or Groups	1	2 ¹	3	4	5
Cairo, proper		16	16	21	22	23
Cairo, for beyond.....		14	16	17	18	19
Evansville, for beyond.....		20	22	23	24	25
Louisville, for beyond		19	21	22	23	24
Cincinnati, proper and for beyond.....		21	23	24	25	26

¹Referred to in testimony as Group No. 1.

10 I. C. C. REP.

TABLE II.

Rates in cents per 100 pounds of Georgia Southern & Florida Ry. Company.

To —	Groups	1	2	3	4	5
Cairo, proper		21	22	23	24	21½
Cairo, for beyond		17	18	19	20	17½
Evansville		23	24	25	26	23½
Louisville		22	23	24	25	22½
Cincinnati		24	25	26	27	24½

TABLE III.

Rates in cents per 100 pounds of Central of Georgia Railway.

To —	Groups	1	2	3	4
Cairo		17	16	16	16
Evansville		23	22	20	20
Louisville		22	21	19	19
Cincinnati		24	23	21	21

TABLE IV.

Rates in cents per 100 pounds of Atlantic Coast Line R. R. Company.

To —	Groups	1	2	3	4	5	6
Cairo		20	21	21	22	23	20
Evansville		22	23	23	24	25	22
Louisville		21	22	22	23	24	21
Cincinnati		23	24	24	25	26	23

The rates from the lumber producing territory west of the Mississippi composed of that part of Louisiana west of the River and of Arkansas, and from the territory east of the Mississippi composed of that part of Louisiana east of the river and of Mississippi and part of Alabama, are blanket rates, being the same from all shipping points to the same destination. Those rates as advanced, April 15, 1903, are as follows:

TABLE V.

From —	To —			
	Cairo.	Evansville.	Louisville.	Cincinnati.
Arkansas	16	23	27	27
Louisiana, Mississippi, Alabama and Group 2 of Southern Railway in Georgia	16	22	21	23

(NOTE.—The rate (16 cents) from Texas points to Cairo in force at date of advance has been restored.)

By a comparison of the rates in Table V. (rates from Louisiana, Mississippi and Alabama and Group 2 of Southern Railway) with the rates in the preceding four tables, I., II., III. and IV. (Rates from Georgia), it will be found that the rates in table V. are lower for the most part than the rates from all the groups in Tables II., III. and IV.; that they are the same as the rates from Rate Basis or Group No. 2 of the Southern Railway Company (Table I.) and higher by 2 cents than the rates from Rate Basis or Group No. 1 of that road. They are lower by 1 cent than the rates from Group No. 3, by 2 cents than the rate from Group No. 4 and by 3 cents than the rate from Group No. 5 of that road.

Group or Rate Basis No. 2 of the Southern Railway, as set forth in its lumber tariff, embraces among others, stations from Macon, Georgia to Brunswick, Georgia, inclusive, the Hawkinsville Branch, Columbus and Fort Valley, Georgia, and Group I. embraces, among others, stations on the line from Atlanta, Georgia to Virgin, Georgia, inclusive, the Fort Valley Branch, the Attalla Branch, stations from Phelps, Georgia, to Berwin, Georgia, inclusive, from Lindale, Georgia, to Howell, Georgia, inclusive, and from McDonough, Georgia to Gentian, Georgia, inclusive. (The above group embracing stations on the Southern Railway from Macon to Brunswick, Georgia, inclusive, is referred to in the testimony as Group I., but in the tariff it is designated Rate Basis No. 2).

There is not as much lumber business on the Southern Railway—particularly, from Macon to Brunswick—as on the Georgia Southern & Florida, the Central of Georgia, the Atlantic Coast Line and the Seaboard Air Line roads. The Southern Railway rates appear to be lowest from the groups where there is comparatively little lumber business, and, from much the larger portion of the lumber producing territory of Georgia the rates are higher as shown in the foregoing Tables I., II., III. and IV., than the rates from Louisiana, Arkansas, Mississippi and Alabama, as shown in Table V.

The rates in the foregoing Tables I., II., III., IV. and V., are to the Ohio River crossing, Cairo, Evansville, Louisville and Cincinnati. As before stated, the roads beyond the Ohio charge

their full local rates from the Ohio River crossings to points of destination in Central Freight Association Territory. Chicago, Ill., Detroit, Mich., Cleveland, O., Indianapolis, Ind., and Pittsburg, Pa., may be taken as representative points of destination in that territory. The rates from the Ohio River crossings to those cities are shown in the table below:

From —	TABLE VI.				
			To —		
	Chicago.	Detroit.	Cleveland.	Indianapolis.	Pittsburg.
Cairo	10 cts.	14 cts.	15 cts.	9 cts.	18 cts.
Evansville	10	12	14	7	16
Louisville	11	12	13	8	14
Cincinnati	10	10	10	7	10

These rates added to the rate to Ohio River crossings set forth in Tables I., II., III., IV. and V. give the total through rates to the destinations named from Georgia shipping points.

3. There are divisions of the rates south of the Ohio between what are termed the "originating roads" on which the lumber is principally manufactured and the roads intermediate between those originating roads and the Ohio River crossings. The amounts or divisions allowed the originating roads are large in proportion to the lengths of the hauls made by them and in proportion to the balances of the rates left for the intermediate roads. For example, the Southern Railway allows the lines south of Macon from $5\frac{1}{2}$ to $7\frac{1}{2}$ cents out of the rate to the Ohio. This leaves as the proportion of the Southern out of the 16-cent rate from Group 2 to Cairo from $8\frac{1}{2}$ to $10\frac{1}{2}$, which yields a comparatively small rate per ton per mile. The rate per ton per mile, however, under the total rate to the river, which is the rate the shipper has to pay, is materially higher. The advance of 2 cents complained of in this case goes to the intermediate roads, north of Macon, Albany or Montgomery, and none of it to the originating roads or to roads beyond the river.

4. There have been from time to time changes or fluctuations in the lumber rates from the different groups into which, as heretofore stated, the lumber producing districts in Georgia

10 I. C. C. REP.

have been divided for the purpose of fixing rates. It is not necessary to set forth the changes in all of these numerous groups. We give below a table showing rates at present effective and those which have been in force at various dates since and including April 11, 1887, to the Ohio River crossings from the Southern Railway group embracing, among others, stations on that road between Macon and Brunswick, spoken of, as before stated, in the testimony as Group 1, but designated in the Southern Railway Tariff as Rate Basis 2.

TABLE VII.
Rates from Group 2, Southern Railway.

To —	Apr. 11, 1887.	Sep. 20, 1889.	Nov. 28, 1891.	Sep. 6, 1892.	July 16, 1893.	May 17, 1894.	Sep. 8, 1899.	June 22, 1903.
	B F	B F						
Cairo, proper.....	.. ..	20 23	17 17	16 13	14 10			
Cairo, beyond.....	.. ..	20 23	17 17	16 13	14 16			
Evansville	20 23	20 23	20 19	19 19	20 22			
Louisville	20 23	20 23	20 18	18 18	19 21			
Cincinnati	20 23	20 23	20 20	20 21	21 23			

NOTE. The letters "B" and "F" over the rates in force April 11, 1887, and September 20, 1889, stand for box and flat, the rates on lumber in flat cars having been then 3 cents higher than when hauled in box cars. This difference in rates was made because flat cars used in hauling lumber are, for the most part, returned empty.

From the above table it will be seen that the rates from the Group named to Cincinnati, Louisville and Evansville, as advanced June 22, 1903, are made higher than they had been since November 28, 1891; that the rates to Cairo are made higher than they had been since May 17, 1894; that the rate to Cairo was reduced from 16 cents to 13 cents May 17, 1894, and remained 13 cents to September 8, 1899, a period of about five years and four months, and that at the latter date it was increased to 14 cents and remained 14 cents until June 22, 1903, nearly four years, when the present advance to 16 cents became operative.

Prior to May 17, 1894, as shown by the foregoing Table VII., the rate to Cairo from Georgia Group 2 of the Southern Railway (embracing, as above stated, among others, shipping

points between Macon and Brunswick) were higher by 3 cents than the rates from Arkansas and territory in Mississippi and Louisiana west of the Mississippi River, but at that date the rates from said Group were made, and have since continued to be, the same as the rates from Arkansas and the said other territory named west of the river. This is not true, however, as to the other groups or rate basing districts in Georgia (See Tables I., II., III., IV., V., *supra*).

The distances to Cairo from lumber shipping points in Arkansas, Louisiana and Mississippi, are less than from Georgia shipping points. The following appear to be approximately correct as average distances to *Cairo*, to wit, from Arkansas, 365 miles; from Louisiana (taking Sibley as a central shipping point), 499 miles; from Mississippi, 412 miles, and from the principal Georgia shipping points, 739 miles.

The average distance from the Georgia shipping points to *Cincinnati* is somewhat less than from Mississippi points. The average distance from Georgia is approximately 665 miles and from Mississippi 701 miles, a difference of 36 miles in favor of Georgia. The rates, however, from much the larger portion of the lumber districts of Georgia are higher to *Cincinnati* as well as to the other Ohio river crossings than from Mississippi, Alabama, Louisiana and Arkansas. (Tables I., II., III., IV. and V.).

5. After the advance in rates from Georgia points, June 22, 1903, there was a material falling off in the shipments of lumber to the west or points on and north of the Ohio River. In July, August and September, 1903, the shipments through the western gateways of the Herman H. Hetler Lumber Company of Chicago, whose southern office is at Tifton, Ga., were 40 per cent less than they were the preceding year, 1902. The Garbutt Lumber Company, located at Wright, Wilcox County, Ga., 8 miles from Fitzgerald, a station on the Seaboard Air Line Railway, shipped in 1892 to all points 449 carloads of lumber, of which 35 went to Tennessee, Kentucky and the west. In 1903, they shipped only 18 carloads to Tennessee, Kentucky and the west out of 430 carloads to all points. The Stewart Lumber Company, located at Brinson, Ga., a station on the 10 I. C. C. REP.—36.

Atlantic Coast Line, 7 miles from Bainbridge, shipped in August, 1902, to points north of the Ohio, 50 carloads and in September of that year, 63 carloads; in August, 1903, the shipments fell off to 36 carloads and in September, to 20 carloads. The testimony shows a falling off in the shipments to the west by other lumber mill companies throughout Georgia. Shipments of lumber from stations on the Central of Georgia Railway to points on and north of the Ohio river in October, 1902, and 1903, were as follows:

To —	1902		1903	
	Box cars.	Flat cars.	Box cars.	Flat cars.
Points on and north of Ohio river,	6496	2873	6263	1854

This shows a falling off in 1903 to the extent of 233 box cars and 1019 flat cars.

In October, 1902, there were shipped from Georgia points via the Atlantic Coast Line Railroad to the Ohio River points and points north, 27,509,250 pounds of lumber, and in the same month in 1903, 16,475,910 pounds, a decrease of 11,033,340 pounds.

In October, 1902, the Seaboard Air Line Railway transported from Georgia points consigned to the Ohio River points and beyond 98 carloads of lumber, and in 1903, 61 carloads, a decrease of 37 carloads.

The decrease in the shipments to the west was due in part to the smaller demand for lumber by the railroads and the car-manufacturing companies in the west, which resulted from the fact that the railroads ceased to make purchases of equipment in the way of cars, etc., to as great an extent as they had been doing. It was also attributable in part to the advance in rate.

The lumber shipped west is for the most part low grade, such as low grade ceiling, decking, car framing, car sills, etc. The high grade lumber goes as a rule east and the shipment of lumber to the east has increased since the advance in the rate. There does not appear to have been an advance in rates from Georgia to New York, Boston and the east, at the time of the advance in rates to the west. Lumber from Georgia moves

10 I. C. C. REP.

east all-rail and also by water from the coast points, principally Savannah and Brunswick.

Since the advance in the rate the shipments of lumber from Georgia to points south of the Ohio River in Tennessee and Kentucky have increased. In October, 1902, there were shipped to those points via the Central of Georgia Railway 1066 box cars of lumber and 623 flat cars, and in October, 1903, 2524 box cars and 1781 flat cars, being an increase to the extent of 1458 box cars and 1158 flat cars.

6. The rate is the same on all grades of lumber, being as high on low grade lumber of comparatively small value as on high priced, high grade lumber. On many low grade classes of lumber shipped from Georgia to the west, the freight charges exceed the value at the mill. On 14 carloads shipped to the west during March, 1903, *before the advance in rates became effective*, from the mills of the Garbutt Lumber Company, Wright, Wilcox County, Ga., the total mill price of which was \$1,036.15, the freight charges were \$1,218.67, an excess of \$182.52 over the mill price. On the high grades of lumber, comparatively little of which is shipped to the west, the freight charges are, as a rule, less than the value at the mill. The total freight charges on 44 carloads of lumber shipped over the Southern Railway in March, 1903, to western points were \$5,823.83 and the total price (whether mill price or market price does not clearly appear) was \$7,432.98, the freight charges being about 78 per cent of the price. These 44 cars of lumber were selected out of a list of over 600 for the purpose of showing, as the witness, L. Green (assistant general freight agent of the Southern Railway Company), testified, that "much of the lumber shipped to points on and north of the Ohio River does exceed freight charges in value, and not that all exceeded the freight charges in value." The value per thousand feet of these 44 carloads of lumber ranges from \$11 per thousand feet to as high as \$31.50, which is much above the average value of low grade lumber at the mills. The percentages of freight charges to *market* value are, of course, less than such percentages to *mill* prices. The witnesses for the defendants name other commodities, the freight charges on which are greater at the point

10 I. C. C. REP.

of destination than the value of such commodities at the point of shipment; for instance, coal, brick, lime, cement, some kinds of clay, building stone, crushed stone, certain ores, cinders, slack, gravel, sand and sawdust. On no other article of as much value and of as great utility as lumber do the freight charges exceed the price at point of shipment.

7. As appears from statements put in evidence by defendants, the market price of grades A, B, and C yellow pine lumber, consisting, respectively, of 1st and 2d flooring (A), common flooring (B), and dimension stuff and timber under 12" x 12" x 30" (C), in the *Chicago Market*, January 1, 1892, and June 30, 1903, were as follows:

Grade	Prices, January, 1892.	Prices, June 30, 1903.
A	\$21 00 to \$22 00	\$21 00 to \$22 00
B	15 00 to 16 00	18 50 to 19 50
C	21 50 to 23 50	19 50 to 22 00

From January, 1892, to June 30, 1903, a period of over eleven years terminating at the time of the advance in rate, there were many variations in the prices. They appear to have been lowest from 1895 to 1899, both inclusive. The prices for the first quarter of each of those years were as follows:

Grade	1895	1896	1897	1898	1899
A	\$14 00	\$16 00 to 16 50	\$12 00	\$14 00	\$15 00 to 15 50
B	\$11 00 to 11 50	\$13 00 to 14 00	\$10 00	\$12 00	\$12 50 to 13 00
C	\$16 50 to 17 00	\$15 75 to 17 00	\$15 50	\$18 00	\$15 00 to 17 00

10 I. C. C. REP.

Prices from 1899 to and including June 30, 1903, were as follows:

Grade	1900 1st Quarter	1901 1st Quarter	1902 1st Quarter	1903 2nd Quarter ending June 30.
A	\$21 25 to 22 25	\$19 00 to 20 00	\$22 50 to 23 50	\$21 00 to 22 00
B	\$18 25 to 18 75	\$16 50 to 17 00	\$18 50 to 19 50	\$18 50 to 19 50
C	\$18 75 to 21 25	\$18 50 to 21 00	\$19 50 to 22 00	\$19 50 to 22 00

While the prices in the *St. Louis market* on the different grades and dimensions of lumber fluctuated during the period from January 15, 1900, to April 1, 1903, they were not materially different at those dates. In some instances they were somewhat higher in April, 1903, than in January, 1900, in others lower and in others the same.

For example:

	Jan. 15, 1900.	April 1903.
Flooring, Edge Grain A	\$26 25	\$27 25
Flooring, Edge Grain B	24 75	24 75
Flooring, Flat Grain A	20 75	20 25
Flooring, Flat Grain B	19 75	19 25
Flooring, No. 1 Common	17 75	16 25
Flooring, No. 2 Common	15 25	12 25
Partition A	22 50	21 75
Bevel Siding A	15 25	14 00
Common Boards	17 50	18 00
Fencing	16 50	16 00
Heavy Joists	17 00	17 50

8. The mill men have been unable to add the advance in the rate to the price at the mills and that price has decreased since 10 I. C. C. REP.

the advance in the rate. The decline in price is stated by various mill owners to be from 50 cents to \$1.50 per thousand feet. The following statement furnished on the request of this Commission by the Stuart Lumber Company of Brinson, Ga., shows that their average mill price in August, 1902, was \$12.41, and in October, 1903, \$10.80, a decrease of \$1.61.

Month.	Year.	No. cars.	Average price at mill.
August	1902	77	\$12 41
September	"	60	11 59
October	"	75	11 79
November	"	47	10 73
December	"	64	10 99
January	1903	60	11 20
February	"	66	11 56
March	"	92	11 15
April	"	100	11 29
May	"	82	11 75
June	"	82	11 02
July	"	69	13 12
August	"	66	11 05
September	"	41	10 39
October	"	47	10 80
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The mill prices as well as the market prices vary with the grades or quality of the lumber and the witnesses in speaking of the mill prices do not, as a rule, give the grade or quality. From all the testimony on the subject, it is safe to say that the average mill price on all classes is from \$11.00 to \$12.00 per thousand feet.

The cost of manufacturing the lumber, including "stumpage (which is the standing timber, exclusive of the land), cutting, hauling, tram roads, actual manufacture at the mills and loading on the cars," is given at from \$7.50 to \$8.00 per thousand. The witnesses do not state whether or not this includes insurance, interest on investment and depreciation of property. (The latter is estimated at 10 per cent per annum.) The Babcock Brothers Lumber Company, whose plant is located at Babcock, Ga., on the Georgia, Florida and Alabama Railroad, make about

10 I. C. C. REP.

\$1.00 a thousand profit, and their output is 3,000,000 feet per month, on which at \$1.00 a thousand, the monthly profit would be \$3,000, and the annual profit on the same monthly output, \$36,000. The total investment of this company is \$560,000, on which an annual profit of \$36,000 would not be quite 6½ per cent. This firm on the result of its business for the year preceding the advance in rates, considered itself justified in doubling its capacity. The data furnished as to other lumber companies in Georgia do not show the profits resulting from their operations. On the whole, it may be said that the lumber business, while it lasts, is fairly, but not exceptionally, remunerative.

After the lumber is all cut from the land, the lumber mill equipment, such as "mill buildings, tenement houses, skids and all the general outside paraphernalia of the mill," become practically worthless. The lumber machinery, except the engines, is not adapted to other purposes, and second hand engines can be sold for very little. Consequently, lumber mill men in their business must anticipate a time when a large part of their investment will become worthless. It is estimated that within ten years seven eighths of the largest saw mills in Georgia will have to go out of business because of the exhaustion of the lumber. The lands after the lumber is cut off become in some parts of Georgia valuable for agricultural purposes, and sell, according to location, at from \$1.00 to \$6.00 per acre. When they are sold to settlers, they supply a population that furnishes freight to the railroads.

9. The lumber business has been an important factor in building up and sustaining many of the railways in Georgia. Those of them which penetrate the lumber sections, when first built, had little to depend upon except the transportation of lumber and the supplies necessary for the hands and animals engaged in the lumber business, and the machinery used in the lumber mills. If the lumber shipments were cut off from some of them, it would be with difficulty that they could exist in a solvent condition. It is also true that the roads have been essential to the lumber business and it has been their policy to

10 I. C. C. REP.

encourage and assist in its development with a view to increasing their own revenue.

The tonnage of lumber hauled by the defendants is very large in proportion to that of other commodities of general use and necessity. From the table below, made up from the reports of the defendant roads to this Commission, it appears that the tonnage of lumber transported by them during the years 1901, 1902 and 1903, was greater than that of any one of the commodities named therein except bituminous coal. It is many times greater than the tonnage hauled of the principal products of Georgia and the South, such as cotton, fruits and vegetables, naval stores, etc.

Commodity.	Total Freight Tonnage Reported by the Defendant Roads as originating on Their Lines and as Received From Connecting Roads and Other Carriers.		
	1901	1902	1903
	Whole Tons	Whole Tons	Whole Tons
Grain	2,653,711	2,298,034	3,082,143
Flour	926,203	1,025,319	1,317,908
Other Mill Products	418,511	392,867	510,390
Hay	457,130	384,294	520,053
Tobacco	315,150	305,934	365,146
Cotton	995,144	1,140,766	1,274,727
Fruit & Vegetables	611,473	638,626	883,458
Anthracite Coal	61,330	172,620	30,614
Bituminous Coal	9,490,692	11,340,596	12,417,636
Naval Stores	399,691	403,380	681,863
Iron, Pig & Bloom	1,416,564	1,767,129	1,901,929
Iron & Steel Rails	454,546	529,059	604,365
Cement, Brick & Lime	1,280,622	1,417,113	1,774,604
Agricultural Implements	64,995	68,038	65,453
Wagons, Carriages, Tools, etc.	60,992	57,924	58,175
Wines, Liquors & Beers	227,687	245,300	286,771
Household Goods and Furniture	101,605	123,103	149,586
Merchandise	2,409,379	2,586,341	2,078,539
Lumber	6,566,407	7,158,122	9,808,463

No accurate statistics as to the extent of the lumber mill business in Georgia have been furnished, but it is estimated that there are about 800 mills in the state, large and small. The to-

tal investment in the lumber mill business is estimated to be from \$10,000,000 to \$16,000,000. It does not appear clearly whether or not this estimate includes the land and the standing timber. The total annual output of the mills is said to be approximately 800,000,000 feet, which, at \$11 a thousand, about the average mill price, would amount to \$8,800,000. Before the increase in rate about one-fourth of the annual output, about 200,000,000 feet, moved to the Ohio River crossings and points north of the river.

The weight of lumber depends upon whether it is green or dried, rough or manufactured and also upon its dimensions. The testimony taken in this and other cases indicates that the average weight of the bulk of the lumber shipped would approximate 3,300 pounds per thousand feet. Based on this weight, the 2 cents advance in the lumber rate would amount to 66 cents per thousand feet and on the 200,000,000 feet shipped to the west before the advance, to \$132,000.

10. The operating expenses of the defendant roads have increased from year to year. Those increases are due, for the most part, to the constant growth or enlargement of the business of the roads. The growth in business has resulted from the larger mileage operated, the development of the country traversed by the roads and from advancement in methods of operation and addition to and improvements in equipment of all kinds. The business of the roads, or the tonnage of traffic transported by them, not only in the item of lumber, but also in traffic generally, has been most materially augmented.

The increase in operating expenses is also attributable in part to increases in wages of labor paid by the roads and in the prices of material and equipment required by them, such as steel rails, coal, locomotives and cars of all kinds. The roads have introduced statements showing these increases, which relate principally to the period from 1899 to 1902 or 1903, inclusive.

As heretofore stated (Finding 7) the market prices of lumber in 1902 and 1903 became higher than they had been in 1899, but there has been no material increase in those prices over what they were in 1900. The aggregate amount of lumber purchased

10 I. C. C. REP.

by the roads has greatly increased and in consequence the expenditures therefor have increased. The following table is based upon official reports of the Southern Railway Company and shows for the five years from 1898 to 1902, inclusive, the number of feet of lumber purchased for each of those years by the Southern Railway Company, the total amount paid each year therefor and the cost per thousand feet.

Year.	Feet.	Amount paid for lumber.	Cost per thou- sand feet.
1898	19,077,510	\$202,216	\$10 59
1899	23,902,810	235,195	9 84
1900	33,382,100	432,964	12 97
1901	42,961,900	493,192	11 48
1902	43,500,000	553,320	12 72

From the above table it appears that, while the amount of lumber purchased by the road has more than doubled from 1898 to 1902 and the aggregate amount paid therefor has also more than doubled, the cost per thousand feet for the years 1900, 1901 and 1902, has not increased, but on the contrary, was less by \$1.49 in 1901 than in 1900 and by 25 cents in 1902 than in 1900.

There have been material increases also in the number of employees of the roads, in the number of locomotives and cars purchased, in the quantity of fuel consumed and material required by the roads, as well as in the prices paid.

The aggregate increases from all causes in the operating expenses of the defendant roads from 1899 to 1903, as reported by them to this Commission, and the percentages of operating expenses to gross earnings for those years are shown in the table below. While operating expenses have grown larger for the reasons stated, and the percentages of operating expenses to gross earnings have increased, there has also been an annual increase in gross earnings to such an extent as to have resulted, as a rule, in an annual increase in net earnings. This appears from the table below, which shows in addition to total operating expenses and gross earnings and the percentages of operating expenses to gross earnings, the net earnings per mile of road and the total mileage operated.

TABLE A

Name of road, etc.		Gross earnings from operations.	Total operating expenses.	Percentage of operating expenses to earnings.	Net earnings.	Net earnings per mile of road.	Total mileage operated.
Southern Railway	1899	25,353,686	16,500,526	65.09	8,853,160	1.646	5,958.68
	1903	42,338,243	29,786,069	70.35	12,552,179	1.761	7,136.98
Atlantic Coast R. R.	1899	6,389,612	3,570,479	55.88	2,819,133	1.605	1,756.75
	1903	19,676,746	11,889,597	60.42	7,787,149	1.881	4,138.87
Louisville & Nashville R.R.	1899	24,277,517	16,027,242	66.02	8,250,275	2.621	3,147.94
	1903	35,568,483	24,051,927	67.62	11,516,556	3.299	3,491.30
Nashville, Chattanooga & St. Louis Ry.	1899	6,579,376	4,411,830	67.05	2,167,546	1.823	1,188.75
	1903	9,564,132	6,995,604	73.14	2,568,528	2.149	1,195.29
Seaboard Air Line Ry.	1899	No Report					
	1903	11,954,010	8,238,178	68.92	3,715,832	1.425	2,610.97
Central of Georgia Ry.	1899	5,638,129	3,630,761	64.40	2,007,368	1.317	1,532.37
	1903	8,975,971	6,634,233	73.91	2,341,738	1.269	1,860.22
Georgia So. & Fla. Ry.	1899	953,798	660,916	69.29	292,882	1.028	285.00
	1903	1,635,191	1,180,075	72.17	455,116	1.270	395.00

In the "total operating expenses" in the above table "A" are included expenditures which result in the permanent improvement or betterment of the property of the roads, such as, expenditures for right of way and station grounds, real estate, grading, tunnels, bridges, trestles and culverts, rails, ties, crossings and cattle guards, telegraph lines, station buildings and fixtures, shops, round houses, turntables, water stations, fuel stations, grain elevators, storage-warehouses, docks and wharves, electric light plants and electric motive power plants, gas making plants, and miscellaneous structures. There are also included expenditures for equipment in the way of locomotives and cars of all kinds.

In the following table, "B," are shown for the years ended June 30, 1901, 1902 and 1903, expenditures by the roads named for permanent improvements or betterments and also for locomotive and car equipment, which expenditures are included in "total operating expenses." The expenditures for the former are under the heading "on account of construction," and for the latter under the heading, "on account of equipment."

TABLE B

STATEMENT OF EXPENDITURES "INCLUDED IN OPERATING EXPENSES," ON
ACCOUNT OF CONSTRUCTION AND EQUIPMENT FROM ANNUAL REPORTS OF
THE RAILWAY COMPANIES NAMED FOR THE YEARS 1901, 1902 AND 1903.

NAME OF ROAD.	YEAR ENDING JUNE 30.					
	1901		1903		1903	
	On account of Construction.	On account of Equipment.	On account of Construction.	On account of Equipment.	On account of Construction.	On account of Equipment.
Southern Ry.....					\$493,358	\$1,350,328
Atlantic Coast Line R. R.						
Louisville & Nashville R. R.	\$1,219,273	\$313,535	\$1,060,897	\$428,220	1,483,550	518,820
Nashville, Chattanooga & St. Louis Ry.....	226,253	2,961	293,700	171,484	449,347	677,721
Seaboard Air Line Ry....						
Central of Georgia Ry....				150,301		858,079
Georgia Southern & Flor- ida Ry.....	179,167	64,445	105,768	138,955	106,806	144,326
Macon & Birmingham Ry. Co.						

10 I. C. C. R. R. P.

There was a long period of business depression in the South during which the roads not only could not make improvements in their equipment, roadbed and other property, but were also unable to maintain their various properties in proper or first class condition. When that period passed away, unusual expenditures were required for new engines, new car equipment, the replacing of wornout rails and in other ways necessary to put the roads in good condition and enable them to handle their largely increased business.

The expenses of the saw mill business have increased in like manner as the expenses of the railroads. There has been an advance in the cost of nearly everything that goes into the manufacture of lumber, such as labor, feed for stock, oil, stumpage, etc.

12. The financial condition of the principal defendants appears to have steadily improved for a number of years up to and including the year 1903, in which the advance in rates complained of was made. They were comparatively prosperous at the date of and for years prior to the advance.

The Southern Railway Company has declared dividends for each year from 1897 to 1903, both inclusive, ranging from \$543,000 (1 per cent on \$54,300 of preferred stock), in 1897, up to \$4,500,000 (7½ per cent on \$60,000,000 of preferred stock) in 1903. That road also reports surpluses of from \$464,013, in 1898, to \$2,100,897 in 1902.

The Louisville & Nashville Railroad Company has declared dividends for each year from 1899 to 1903, both inclusive, ranging from \$1,848,000 (about 3½ per cent on \$54,912,520 of common stock), in 1899, up to \$3,000,000 (5 per cent on \$60,000,000 of common stock), in 1903. That road also reports surpluses of from \$40,204, in 1899, to \$2,987,195, in 1903.

The Atlantic Coast Line Railroad Company has declared dividends for each year (except year 1900) from 1894 to 1903, both inclusive, ranging from \$318,399, in 1894 (5½ per cent on \$323,500 of preferred stock, and about 5 per cent on \$7,021,950 of common stock), up to \$1,714,075 (5 per cent on \$1,744,100 of preferred stock and 5 per cent on \$36,10 I. C. C. REP.

650,000 of common stock), in 1903. The surpluses reported by that road are from \$86,875, in 1894, to \$1,293,983, in 1903. In 1900 no dividend was declared, but there was a surplus reported of \$2,152,406.

The Nashville, Chattanooga & St. Louis Railway Company declared dividends ranging from \$100,000, in 1899 (being 1 per cent on \$10,000,000 of common stock) to \$400,000 in 1895, 1896, 1897 and 1898, being 4 per cent on \$10,000,000 of common stock. For each year from 1900 to 1903, that road reported surpluses ranging from \$566,907, in 1900, to \$823,480 in 1903.

The Georgia Southern & Florida Railway Company declared dividends for each year from 1897 to 1903, ranging from \$27,360 (being 4 per cent on \$684,000 of preferred stock) in 1897, up to \$99,240 in 1901 (being 5 per cent on \$684,000 of preferred stock and 6 per cent on \$1,084,000 of preferred stock), in 1903. For each of the years 1902 and 1903, it declared a dividend of \$77,560. The surpluses reported from 1896 to 1903 range from \$9,657 to \$107,060 in 1896. The surplus for 1901 was \$24,165; for 1902, \$41,448; and for 1903, \$77,968.

The Seaboard Air Line Railway Company has declared no dividends, but reports surplus of \$252,676 for 1901, \$769,331 for 1902, and \$754,431 for 1903. The Central of Georgia Railway Company declared no dividends but reports surpluses for each of the years from 1899 to 1903, both inclusive, ranging from \$58,888 in 1899 to \$203,506 in 1903. The Macon & Birmingham Railway Company has declared no dividends and reports a deficit for each of the years from 1894 to 1903, both inclusive, ranging from \$29,099 in 1902 to \$96,715 in 1894. The deficit reported for 1901 was \$34,313, for 1902, \$29,099 and for 1903, \$45,949.

13. No special equipment in the way of cars is furnished or required for hauling lumber. Box cars, flat or open cars and gondolas, which are used in handling other traffic, are furnished by the carriers for hauling lumber. The proportion of box and flat cars (the latter including gondolas) used varies with the different roads and depends upon the length of the lumber. A

10 I. C. C. REP.

large amount of lumber, because of its length, cannot be shipped in box cars and requires the open or flat cars. Of the lumber shipped west, it is estimated from 50 to 60 per cent goes in flat cars. The flat car is the cheapest car built by the roads and it costs somewhat less and is easier to load than a box car. The rates on the flat cars, while now the same, were formerly higher than on box cars; having been at one time higher by 7 cents and afterwards 3 cents. The difference in rates is stated to have been made because box cars are more adapted to other freight besides lumber than are open cars and fewer of the former therefore return empty. Much the larger portion of the box cars come south loaded with grain and merchandise. A large proportion, estimated at from 85 to 100 per cent, of the flat cars return south empty.

It is necessary that open or flat cars of lumber be equipped with standards, braces and supports, for the purpose of protecting the load and train, and this equipment is required to be furnished and attached to the car by the shipper. The witnesses for complainants and for defendants vary widely as to the cost of this equipment. Where the Master Car Builders' Association rules as to the nature or equipment and character of lumber to be used are complied with, the cost per car including value of lumber, labor, nails and freight on weight of equipment, is approximately \$3.50 per car. The standards and other equipment have to be removed at the end of the trip and it is necessary that the shipper attach new equipment for each shipment. This equipment is not required where box cars are used. There are similar requirements as to the equipment of open or flat cars used in shipping other commodities which are shipped in those cars, such as furniture, carriages and machinery, &c.

14. Shippers of lumber endeavor to put into or on the car all it will hold, but it is seldom practicable to load a car to its full stenciled or marked capacity. The loading of a car to capacity depends upon the car furnished, whether it is of the proper length or not, and upon the lumber, whether it is green or dry. The box cars that are furnished for the movement of lumber are built primarily to handle grain and merchandise and cannot be loaded with lumber to their full capacity unless

10 I. C. C. REP. .

the lumber is cut of such length as to occupy all the cubical space. The loading more nearly approximates the capacity of the car in case of green than in dried lumber.

In March, 1903, there were moved via the Southern Railway from points in Georgia and Florida to Ohio River points and beyond 674 cars of lumber. The average load of these cars was 46,794 pounds. The flat cars, 346 in number, loaded to 86.5 per cent of the capacity of the cars and the box cars, 328 in number, loaded to 81.6 per cent of capacity.

In March, 1903, the Louisville & Nashville Railroad hauled from Georgia 655 carloads of lumber. The average loading of these cars was 43,537 pounds, and the box cars loaded to 77.3 per cent of their capacity and the flat cars to 72.1 per cent of their capacity.

In January, February and March, 1903, the Central of Georgia Railway Company hauled 1454 cars of lumber which averaged 35,041 pounds per car, being 76.79 per cent of car capacity.

The carloads of lumber hauled by the Seaboard Air Line Railway in the month of October, 1901, 1902 and 1903, averaged from 68.6 per cent to 79.7 per cent of the loading capacity of the cars used.

The loading of lumber in the cars furnished is less than that of stone, coal, iron, and, perhaps, some other articles, but it is equal to or greater than that of most other commodities. The following table taken from our report and opinion in the case of the Central Yellow Pine Association v. Illinois Central Railroad Company, et al., gives the loading of certain commodities named therein other than pine lumber and the percentages of loading to car capacity.

10 I. C. C. REP.

	Number of cars.	Loading. (Pounds).	Car Capacity. (Pounds).	Loading percent- age of car Capacity.
Cypress Lumber	17	595,100	738,000	81 11
Oak Lumber	8	384,450	490,000	78 47
Cypress Shingles	17	716,600	1,060,000	67 75
Sash Weights	6	253,868	400,000	63 38
Window Glass	9	433,800	610,000	71 00
Cement	20	780,750	1,170,000	66 70
Lime	15	379,400	846,000	44 32
Fertilizer	27	1,089,200	1,630,000	66 79
Cotton Seed Meal	8	250,000	450,000	55 00
Cotton Seed Hulls	38	1,047,400	2,228,000	47 00
Live Stock	6	138,240	340,000	40 60
Furniture	3	39,800	180,000	22 11
Coal	4	241,700	270,000	89 50
	178	6,350,308	10,412,000	

15. Lumber is a constant business for the roads throughout the year; it is loaded by the shipper and unloaded by the consignee; it is not perishable traffic, and therefore, does not require rapidity of movement; there is little or no risk incident to its carriage and in case of accidents the damage is, as a rule, insignificant.

CONCLUSIONS.

1. It is alleged in the answer of the defendants—and their counsel insist that the issue thus presented shall be passed upon by us—that the by-laws and constitution of the Georgia Saw Mill Association “constitute a contract or combination in the form of a trust, or otherwise,” in contravention of the Act of Congress of July 2, 1890, known as the “Anti-Trust Act;” that the complainants as members of the association are acting in violation of that law; that they, therefore, do not come before this Commission with clean hands and “should not be allowed to maintain their bill of complaint in this case.” In the view we take of this matter, it is not necessary to determine whether or

10 I. C. C. REP.—37. •

not the allegation as to the character of the by-laws and constitution of the association and of the action of the complainants as members thereof, be true. In the first place, the complainants constitute but a small portion of the membership of the association, and the association, as such, is not made a party complainant. In the next place, a proceeding like the present before this Commission, although instituted by and in the name of parties complaining of injury to themselves from alleged violations of law, is not a strictly private or personal suit into which a party complainant must enter with "clean hands," but is a proceeding for the enforcement of a public duty as well as of an individual or private right.

The Act to regulate commerce provides that this Commission "may institute an inquiry of its own motion" into a matter of the kind involved in this case "in the same manner and to the same effect as though complaint had been made," and that, where complaint is made, such complaint shall not, "at any time be dismissed because of the absence of direct damage to complainants." In these cases, therefore, the complaint is in the nature of an information and the complainants occupy, in part, at least, the attitude of informers. In the case of the *Interstate Commerce Commission v. Southern Pacific Company, et al.*, (132 Fed. Rep. 829), there was involved an order of this Commission forbidding the enforcement by defendants therein of a rule whereby they reserved to themselves, as initial carriers, the right of routing citrus fruit traffic beyond their own lines and denied this privilege to shippers. The defendants contended that, even if the rule was unlawful, the complainants (shippers) were not entitled to relief, because they had used the privilege of routing for the purpose of securing rebates and desired to retain it for that purpose. In overruling this contention the Court says:

"With reference to defendants' contention, that the complainants before the Interstate Commerce Commission were there with unclean hands, it is only necessary to say, that, in this Court, the Commission represents the public at large and therefore no participation by said complainants in the unlawful practice of rebates could bar relief." (132 Fed. Rep. 847.)

10 I. C. C. REP.

The same principle applies in a case like the present before this Commission. The complainants represent "the public at large," as well as themselves. The public interested includes consignees, consumers and others, as well as shippers and producers or manufacturers.

2. The complainants, on the other hand, charge in their complaint that, in the matter of the increased rates complained of, "the lumber carrying roads, defendants herein, have acted in concert through the medium of defendant, the Southeastern Freight Association, to effect the lessening of competition in transportation rates and facilities and the exaction of higher transportation charges than would be maintained under conditions of unrestrained competition."

It is claimed by the railway companies that in advancing the rates, they acted independently, each for itself, and not through the agency of the Southeastern Freight Association. Whether or not they made use of the Association as a medium or agency is immaterial. The proof shows conclusively that the advance was the outcome of concert of action and a previous understanding between the companies. Through their authorized official representatives they conferred with each other repeatedly as to the making of the advance; recognized the fact that, because of competition in common markets between the lumber producing districts served by them, the advance should be from all those districts or none; and finally they all promulgated the advance to take effect at exactly the same date and for exactly the same amount. This concurrence of action was not only between the railway companies, parties defendant in this case, and in relation to rates from Georgia shipping points, but was participated in by the lumber hauling roads serving the territories both west and east of the Mississippi River, in Arkansas, Louisiana, Mississippi, Alabama and Florida.

It is insisted in behalf of the defendant, that, while there may be this concert of action, it does not amount to an unlawful agreement under the so-called "Anti-Trust Act."

As we have said in our opinion in the case of *The Central Yellow Pine Association v. Illinois Central Railroad Company, et al.* (*ante*, 561), "We deem it unnecessary to express an opinion
10 I. C. C. REP.

on this point, the enforcement of that act being a matter properly cognizable by the Courts. It is clearly, however, within the scope of our authority and duty to consider this joint or concerted action of the defendants in the aspect of its bearing upon the reasonableness and validity of the advanced rate, the result of that action. Where rates are established by concert of action and previous understanding between the carriers, it is manifest, whether or not there be a binding agreement to maintain such rates, that the element of competition is eliminated. Concert of action is wholly inconsistent with competition and, during the time the rates fixed by concert of action are maintained, the effect, so far as competition is concerned, is the same as if there was a binding agreement to maintain such rates.

"Competition is favored by the laws. The object of the pooling section (Section 5) of the Interstate Commerce Act is to prevent, 'any contract, agreement, or combination' between otherwise competing carriers by which competition between them may be done away with. In *East Tenn., Va. & Ga. Railway v. Interstate Commerce Commission*, it is said, 'The Interstate Commerce Law, it is conceded, was intended to encourage normal competition; it forbids pooling for the very purpose of allowing competition to have effect.' (39 C. C. A. 422, 99 Fed. Rep. 61.) The Supreme Court holds that the suppression of competition is violative of the so-called 'Anti-Trust Act,' in that, such suppression restrains trade and commerce by 'keeping rates and charges higher than they might otherwise be under the laws of competition.' (*Joint Traffic Association Case*, 171 U. S. 569, 571, 577, 43 L. ed. 287, 288, 290, 19 Sup. Ct. Rep. 25; *U. S. v. Freight Association*, 166 U. S. 341, 41 L. ed. 1027, 17 Sup. Ct. Rep. 540.)

"The ground upon which competition is favored is that it conduces to the reasonableness of rates or to the protection of the public from unreasonably high or excessive rates. In *United States v. Freight Association*, *supra*, the Supreme Court says, 'competition will itself bring charges down to what may be reasonable' (166 U. S. 339, 41 L. ed. 1027, 17 Sup. Ct. Rep. 540). The Act to regulate commerce (section 1), in prohibiting un-

reasonableness of rates, in effect forbids whatever conduces to such unreasonableness. In any event, it is incumbent upon this Commission, when the reasonableness of rates is in issue before it, to consider how those rates were brought about—whether they are the product of untrammelled competition or the result of a concert of action or combination between the carriers establishing and maintaining them. The advanced rates complained of cannot be claimed to be the outcome of competition, because ‘the natural, direct and immediate effect of competition is to lower’ (171 U. S. 577, 43 L. ed. 290, 19 Sup. Ct. Rep. 25), rather than advance, rates. The advanced rates must be presumed to be higher than rates which unrestrained competition would produce.”

3. The present advanced rate is the last (up to date) of a series of advances, all made by joint or concerted action of the carriers. The advances differ in amount from the different groups into which Georgia is divided. From group 2 of the Southern Railway (to which the testimony of the defendants chiefly relates), the increase in rates has been 3 cents since May, 1894, and 2 cents since September, 1899. For the 5 years and 4 months from May, 1894, to September, 1899, the Cairo rate from that Group was 13 cents, and for about 4 years from September, 1899, to the date of the last advance in June, 1903, the rate was 14 cents. From the other groups, in most cases, the increases since 1894 have amounted to 4 cents. From all the groups the present advanced rates to Cincinnati, Louisville and Evansville are higher than they have been since 1891, a period of over 12 years. For instance, the Cincinnati rate from the majority of the groups is now 4 cents higher than it was in 1892. From Georgia group 2 of Southern Railway the Cincinnati, Louisville and Evansville rates are 3 cents higher than since 1891. (Finding 4.)

The maintenance of materially lower rates for such long periods of time brings this case within the rule that, “Where an advance is made in rates which have long been maintained and the evidence shows that the traffic affected is large, important and constantly increasing, the advance will be held unjust, un-
10 I. C. C. REP.

less it is satisfactorily explained." (Am. & Eng. Enc. Law, 2d ed. Vol. 17, p. 133).

The defendants do not attempt to justify the advance on the ground that the previous rate was unremunerative. The justifications set up are consistent with the remunerativeness of that rate. In their answer they allege, among other things, that, if the advance is not allowed, "the result will be to prevent the respondents and other railroads in the South from sharing to any extent whatever in the phenomenal prosperity of the business in the regular grades of lumber."

The lumber business, it is true, has grown from its inception, but the proof does not show that for the two or three years preceding the advance the prices of the mill products had materially increased or that the profits realized on the business were phenomenally large. (Finding 8.) However that may be, it is clear that, if a rate on an article of traffic is already remunerative, the increased prosperity of the business of manufacturing that article is no ground for an advance of the rate. The claim to the contrary on the part of the carriers is based upon the erroneous assumption, so prevalent among traffic managers that a rate may be made high as "the traffic will bear." On this point we quote what was said by us in the case of *The Central Yellow Pine Association v. Illinois Central Railroad Company, et al.* (ante, 561).

"The test of the reasonableness of a rate is not the amount of the profit in the business of a shipper or manufacturer, but whether the rate yields a reasonable compensation for the services rendered. If the prosperity of the manufacturer is to have a controlling influence, this would justify a higher rate on the traffic of the prosperous manufacturer than on that of one less prosperous. The right to participate in the prosperity of a shipper *by raising rates* is simply a license to the carrier to appropriate that prosperity, or in other words, to transfer the shipper's legitimate profit in his business from the shipper to the carrier."

The carriers necessarily and justly participate in the increased prosperity of their patrons in the resultant enlargement of their own business. This appears to be the case with these

defendants as the tonnage of lumber shipped over their lines and their revenue therefrom have steadily grown in amount. Take the two years, 1901 and 1902, immediately preceding the present advanced rate, and 1903 the year of the advance; the lumber tonnage of defendants has grown in those years from 6,566,407 tons in 1901, to 9,808,463 tons in 1903, an increase of 3,242,056 tons. (Finding 9.)

The business of the defendants, not only in lumber, but in traffic in general, has grown and is growing largely, and in view of the fact, that they derive their franchises, or "right to exist" from the public, the lumber shippers, as part of the public, might plausibly, to say the least, claim that they have a right to participate in the prosperity of the defendants by having their rate reduced rather than advanced. The general rule is, the greater the tonnage of an article transported, the lower should be the rate. No rule is more firmly grounded in reason or more universally recognized by carriers. It is because of the greater density of traffic north of the Ohio River in Central Freight Association Territory and in the Eastern Territory that rates in general are made materially lower in those territories than in Southern Territory.

4. Although both the net and gross earnings of the defendants have grown from year to year, the percentages of what are reported by the defendants as "operating expenses" to earnings have also increased (Table A, Finding 10), and this is urged as showing the necessity for an advance in the lumber and some other rates. It is to be noted, that these operating expenses embrace large annual expenditures for real estate, right of way, tunnels, bridges and other strictly permanent improvements and also for equipment, such as locomotives and cars. (Finding 10.) While payments for repairs, whether applied to permanent improvements or equipment, are properly chargeable to current annual operating expenses, this would not appear to be the case as to the improvements or equipment themselves—the former being permanent and the latter lasting for many years. The expenditures for permanent improvements and for equipment made in a single year may obviate the necessity for like

10 I. C. C. REP.

expenditures or expenditures to the same extent for many years to come and the extraordinary amount of such expenditures made by the defendants in a few years preceding and including the year of the advance in the rate indicates that this will be the case with them. There was, as stated in our finding of fact (Finding 10), a long period of business depression in the South during which the roads not only could not make improvements in their equipment, roadbed and other property, but were also unable to maintain their equipment and various properties in proper or first class condition. When that period passed away, unusual expenditures were required for new engines, new car equipment, the replacing of worn out rails and in other ways necessary to put the roads in proper condition and enable them to handle their largely increased business. As these expenditures were included in the operating expenses reported by the roads, the latter became exceptionally large, reaching a percentage of gross earnings which it is not probable will be maintained in the future. It appears that the demand by the roads for lumber and car equipment has diminished and that this is in part the cause of the reduction of the tonnage of timber shipped west from Georgia.

If permanent improvements are not included in the operating expenses of the defendants and if only such expenditures for equipment as are properly chargeable to a single year are so included, the percentages of operating expenses to gross earnings will be materially reduced.

The total annual increases in operating expenses, however, are mainly attributable to the constant growth or enlargement of the business of the roads. The greater the volume of business, the greater is the aggregate cost of conducting it, or in other words, of operating the roads.

The operating expenses have also, as shown by our findings of fact (Finding 10) been made larger by higher wages paid employees and advanced prices of material and equipment. It is to be borne in mind, however, that the cost of the manufacture of lumber has increased in like manner as the expenses of the railroads. There has been an advance in the cost of nearly

10 I. C. C. REP.

everything that goes into the manufacture of lumber, such as labor, feed for stock, oil, stumpage, &c.

5. As before stated, the advance in the rate is not sought to be justified on the ground that the rate in force was unremunerative or not a reasonable return for the service rendered. The principal ground urged is that additional revenue was needed to meet increased expenses and that, in the language of one of the principal witnesses for the defendant, they "looked around to see where they could best get that additional revenue and one of the commodities which they thought would *bear* the advance was lumber."

Carriers have no right to advance a rate which is already reasonably high and which yields an adequate return for the service rendered, solely because additional revenue is needed. In *Smyth v. Ames* (169 U. S. 547, 42 L. ed. 849, 18 Sup. Ct. Rep. 418), the supreme Court held that "the public is entitled to demand that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

. . . "It cannot therefore be admitted that a railroad corporation maintaining a highway under the authority of a state may fix its rates with a view solely to its own interests and ignore the rights of the public." In *Covington & Lexington Turnpike Road Co. v. Sanford* (164 U. S. 596, 597, 41 L. ed. 566, 17 Sup. Ct. Rep. 198), it is said: A corporation "is not entitled, as of right and without reference to the interests of the public, to realize a given per cent upon its capital stock. . . . Stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. . . . The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends."

It is clear, therefore, that the mere fact of the need of additional revenue to meet increased expense does not justify the advance in the rate on lumber.

It is said by the witness above referred to that lumber was selected because it was thought lumber would "*bear the advance*." This excuse for selecting lumber is based upon the erroneous idea, hereinbefore alluded to, that any rate is just-
10 I. C. C. REP.

fiable under which "the traffic will move." Conceding for argument's sake that this is a proper test, the evidence tends strongly to show that the lumber shipped from Georgia to the West was not of the character to bear the advance. That lumber was, for the most part, low grade lumber of comparatively small value. A rate under which an article of high value will move may be prohibitory when applied to an article of comparatively little value. On many of the low grade classes of the lumber shipped from Georgia to the West, the freight charges *under the rates prior to the advance* equaled, and in some cases exceeded, the value at the mill. The rate being the same on all grades of lumber, the advance affected more seriously the shipments of low grade than of high grade lumber. The natural effect or tendency of a material increase in a rate on a commodity, is to restrict the territories or markets to which that commodity can be profitably shipped. The advance in the rate June 22, 1903, was followed by a material falling off in shipments of lumber from Georgia to the West. The decrease in shipments appears to have been in part due to the diminished demand for lumber by the railroads and the car manufacturing companies in the West, but it was also attributable largely to the advance in the rate.

6. It is urged in behalf of the carriers that "for the transportation of lumber they are compelled to haul a large number of flat cars to the mills empty," and that "it is a common practice for shippers of lumber to load the cars below their capacity." These are conditions which are properly taken into account by carriers in fixing rates and which, presumably, were considered by the defendants in establishing and maintaining the lower rates so long in force prior to the advance. There is no claim that the hauling of empty cars to the mills and the alleged underloading originated or had increased at the date of the advance and had not been previously taken into account.

As to empty cars, the proof is that box cars when brought south for lumber, are for the most part, loaded, but that from 85 to 100 per cent of the flat cars brought south for lumber (and which constitute from 50 to 60 per cent of the total number of cars used in hauling lumber) come south empty. (Find-

ing 13.) It also appears that a portion of the box cars which come from the west would return empty but for lumber. As to loading, the proof is that the shippers load such cars as are furnished them to as near their capacity as is practicable, but it is impracticable, as a rule, to load to full capacity, either because, as contended by complainants, the cars are not adapted to the dimensions of the lumber, or, as contended by the carriers, the lumber is not adapted to the dimensions of the cars. As it is, the loading of lumber is equal to or greater than that of a large number, if not most, of the principal commodities transported by the defendants. (Table, Finding 14.)

7. For the purpose of showing the reasonableness of the lumber rate, it is compared with the rates on other commodities produced in South Carolina, Georgia and Florida and shipped to the central west, such as "oranges, pineapples, watermelons, peaches and other fruit, rosin, turpentine, pyroligneous products, cotton seed oil, and cotton factory products." Important among the controlling factors in fixing rates are value, volume, risk and cost of handling. The rates are per hundred pounds or, in other words, based on weight. Lumber is much less valuable per weight than most, if not all, the above articles and its volume is many times greater. The larger portion or nearly all of the above articles are what are termed perishable and, therefore, involve greater risk and greater cost in handling than lumber. The rates on lumber, therefore, should be not only not as high as, but materially less than, the rates on those articles. The rate on lumber prior to the advance appears to have been a reasonably high rate when compared with the rates on other commodities which are at all analogous to lumber in respect to value, volume, risk, cost of handling and the various other circumstances and conditions affecting the transportation of traffic.

8. The defendants, other than the originating roads, complain of the small amount of revenue or low rate per ton per mile realized by them out of their proportions of the through rates. This is due to the large allowances out of the rates made to the originating roads. (See Finding 3.) Those allowances commenced under the lower rates in force prior to 10 I. C. C. REP.

the advance and raise the presumption that those lower rates minus the allowances were then considered reasonably remunerative for the remainder of the hauls to the Ohio River crossings. As the advance of 2 cents goes entirely to the roads continuing the transportation on to the Ohio and none of it to the originating roads, the inference is that the advance was made solely with a view of increasing the proportions of the former roads. If the allowances to the originating roads are unreasonably large, as they appear to be from a distance standpoint, and result in unreasonably low proportions to the other roads, this cannot be remedied by an advance in the total through rates *charged the public*. It is the total rate, and not its proportions, which is in issue.

9. While the railways in Georgia have been essential to the development of the lumber business and it has been their policy to encourage and assist in its development, that business has been an important factor in building up and sustaining many of those railways. The roads which penetrate the lumber sections, when first built, had little to depend upon except the transportation of lumber and of the supplies of all kinds required in its manufacture. This should predispose the railways, as far as practicable without discriminating against other traffic and without doing injustice to themselves, to favor the lumber industry and cause them to abstain from placing any additional burden or tax upon that industry except in a clear case of necessity. In this connection it is proper to consider that, while the business of the railways may be said to be permanent, the lumber business has a limited tenure of life, the evidence being that within about ten years the yellow pine forests of Georgia will have been exhausted and the large investments of lumber manufacturers in their plants, including buildings, machinery and tram roads, will have become practically valueless. (Finding 8.)

Under the materially lower rates in force for many years prior to the advance of June 22, 1903, the lumber business had been a paying business to the roads. Their net revenue grew larger from year to year during that period and, as the tonnage of lumber also constantly increased, the increase in net revenue

may be fairly attributed in part to lumber. Lumber is an inexpensive freight and only a few other commodities furnish to carriers so large a tonnage. The transportation of lumber is a constant business, yielding the carriers revenue throughout the year. No special equipment is constructed or furnished for its carriage. It is loaded by the shipper and unloaded by the consignee, and where flat or open cars are furnished, the shipper is required at considerable expense to equip them so as to protect the lumber and the train. It is not what is known as, "perishable traffic" and does not require rapidity of movement; there is small risk incident to its transportation, and, in case of accident, the damage is insignificant. Lumber is moreover an article of general utility. For these and other reasons lumber should be given rates which are relatively low.

We find and conclude that the said advance of 2 cents per hundred pounds in the rates on lumber from the said shipping points in Georgia to the said Ohio River Crossings made effective June 22, 1903, was not warranted by the facts, circumstances and conditions disclosed by the testimony, and that the increased rates then put in force are unreasonable and unjust.

An appropriate order will be issued in accordance with these conclusions.

KNAPP, *Chairman*, and FIFER, *Commissioner*, dissenting:

In the view we take of this case the conclusions of our associates are not justified by the facts and circumstances appearing in the record or otherwise entitled to consideration. Holding that the rates complained of have not been shown to be in violation of law we respectfully dissent from the foregoing report and opinion.

10 I. C. C. REP.

No. 575.

THE CONSOLIDATED FORWARDING COMPANY

v.

THE SOUTHERN PACIFIC COMPANY; THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; THE SANTA FE PACIFIC RAILWAY COMPANY; and the SOUTHERN CALIFORNIA RAILWAY COMPANY.

No. 576.

THE SOUTHERN CALIFORNIA FRUIT EXCHANGE

v.

THE SOUTHERN PACIFIC COMPANY; THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; THE SANTA FE PACIFIC RAILWAY COMPANY; and THE SOUTHERN CALIFORNIA RAILWAY COMPANY.

THE CONTINENTAL FRUIT EXPRESS COMPANY
and ARMOUR & COMPANY, INTERVENERS.

Decided February 11, 1905.

1. Defendants' minimum carload weight of 26,000 pounds for the carriage of citrus fruit in refrigerator or ventilator cars from Southern California points to eastern destinations is not unreasonable with the 40-foot car in general use.
2. Whether or not the regulating statute applies to refrigeration charges in all cases, the defendants, by compelling shippers to pay icing charges on citrus fruits as established by the car lines or do without necessary

10 I. C. C. REP.

refrigeration for the traffic, have made these charges part of the cost of transportation and subject to regulation under the law.

3. The refrigeration charges applying on shipments of citrus fruits from Southern California points to eastern markets have been reduced during the pendency of this proceeding, and the present charges for refrigeration are not found, upon the record of this case, to be unreasonable.
4. Defendants are unlawfully engaged in pooling the traffic in citrus fruits originating in Southern California and carried by them and their connections to eastern markets. Further action upon that branch of this proceeding is reserved by the Commission, in view of the pendency in the United States Supreme Court of an appeal from a like decision of the Circuit Court for the Southern District of California, in a suit brought by this Commission to enforce its order herein prohibiting the defendants from continuing to apply and enforce a provision in their tariff reserving to themselves the routing of this traffic to eastern destinations, and depriving shippers of their right to determine which of various established routes shall be used for the transportation of their property.
5. Defendants' present rate of \$1 per 100 pounds on lemons in carloads from Southern California to points on and east of the Missouri River is apparently reasonable.
6. Defendants' rate of \$1.25 per 100 pounds on oranges in carloads carried from Southern California to points on and east of the Missouri River is unreasonable and unjust.

Hunsaker & Britt and *Graves, O'Melveny & Shanklin* for complainants.

Joseph H. Call, special attorney, for Commission.

Wm. F. Herrin and *P. F. Dunne* for Southern Pacific Co.

E. D. Kenna, C. N. Sterry, Robert Dunlap and *Paul Burkes* for other defendants.

F. D. Madison and *L. C. Krauthoff* for interveners.

REPORT AND OPINION OF THE COMMISSION.

CLEMENTS, *Commissioner*:

Under the decision of the Commission rendered in these cases April 19, 1902, the defendants, initial carriers of citrus fruits from California to eastern localities, were ordered to cease and desist from enforcing a regulation whereby they denied to shippers and reserved to themselves the privilege of

10 I. C. C. REP.

routing oranges and lemons shipped from points in Southern California to eastern destinations over particular connecting roads, although numerous through routes had been duly established and over which a common through rate applied. The defendants refused to obey the order. Upon the institution of proceedings by the Commission in the United States Circuit Court for the Southern District of California, the defendants filed demurrers to the petition, which after argument were overruled by the Court. *Interstate Commerce Commission v. Southern Pacific Co. et al.*, 123 Fed. Rep. 597. Thereupon the case proceeded to trial and after submission of voluminous testimony and full argument by counsel the Court on September 6, 1904, handed down its decision requiring obedience of the defendants to the order of the Commission. *Interstate Commerce Commission v. Southern Pacific Co. et al.*, 132 Fed. 829.

The decision of the Circuit Court enforcing the order of the Commission against the defendants' regulation denying shippers the right to have their freight carried over such established routes as they may select rests upon its finding and determination that the defendants as initial carriers are engaged with the various connecting lines in a traffic pool in violation of section 5 of the Act to regulate commerce, and at the end of the opinion the following statement appears: "My conclusions on the pooling issue render it unnecessary for me to pass upon any of the other questions which have been raised in the case."

The decision of the Commission of April 19, 1902, reserved for further investigation the following questions:

1. The reasonableness of defendants' rate of \$1.25 per hundred pounds for the transportation of citrus fruits from California to points on and east of the Missouri River.
2. The reasonableness of defendants' established carload weight of 26,000 pounds for citrus fruit shipments.
3. Whether the statute applies to charges made for the refrigeration of these citrus fruit shipments, and, if so, whether such charges are just and reasonable.
4. Whether the defendants pool their citrus fruit traffic or divide the earnings therefrom.

That decision contained some findings of fact upon each of these questions and now, upon the investigation in regard thereto, which has been made by the Commission during the pendency in Court of the case involving the routing question, further findings of fact are made and stated as follows:

FINDINGS OF FACT.

As modified by the additional facts hereinafter found the findings contained in the first decision herein are to be regarded as part of this record.

Reasonableness of the Rate.

The rate of \$1.25 per hundred pounds on oranges, the methods followed in producing, picking, sorting, packing, shipping and transportation, have not materially changed since the decision rendered April 19, 1902.

The rate on lemons is still \$1.25, except for the five months December to April inclusive of each year, during which period the rate is \$1.00 per hundred pounds. On April 1, 1904, the time for the \$1.00 rate was extended to June 15, 1904. This rate of \$1.00 was put in force by the carriers in the fall of 1902, upon the application of lemon growers and shippers of Southern California, as an emergency rate to enable California lemons to meet competition in the East of lemons grown in foreign countries. The lower rate on lemons during the winter and early spring has greatly benefited the growers and under it the revenue of the carriers from this traffic has been greater than it would have been under the \$1.25 rate. The cost of producing lemons is about the same as that of producing oranges. Lemons, though somewhat more liable to damage by frosts, are, generally speaking, a more hardy fruit than oranges.

In 1903 about 88,000 acres in California were planted in citrus fruits. The number of cars hauled to eastern destinations during the seven seasons prior to 1904-1905 were:

10 I. C. C. REP.—38.

Season	Number of Cars.
1897-1898	14,176
1898-1899	9,477
1899-1900	16,450
1900-1901	22,392
1901-1902	15,867
1902-1903	20,724
1903-1904	25,194

The figures of 1903-1904 were obtained from the traffic officials of the two initial roads subsequent to the hearing.

The price to growers on board cars in California in 1901-1902 averaged about \$1.40 per box while in the year following the average was only about \$1.00 per box. The market price in the East was also lower in the latter year. On the other hand the quality of the fruit was not as good as it was in the previous season. Extreme cold, an unusually large crop and the great quantity of apples grown and marketed are some reasons advanced for the low price of oranges in 1902-1903. The time consumed in transportation also has an influence upon the quality and price. The price of lemons was about 25 cents higher in the latter year.

The citrus fruit groves in California range in value from \$500 to \$1,500 per acre, depending upon location, age, freedom from frost and disease and the supply of water for irrigation. The average price per acre fairly estimated is \$1,000 for groves in good condition at eight years of age, and it costs substantially that sum per acre to acquire land and water and bring the groves to bearing and good condition in seven or eight years. With seven per cent as the prevailing rate of interest, the cost to the grower upon his investment in a full bearing grove is about \$70 per acre. The average yield of an orange grove is about 200 boxes per acre and upon this basis the investment cost is 35 cents per box. The cost per box of oranges for cultivation, irrigation, fertilizing, picking, sorting, packing, boxing, hauling and selling is about 75 cents per box. The total cost to the grower is, therefore, on the average about \$1.10 per box. Compared with the free on board prices in California the grower made 30 cents a box in 1901-1902 and lost 10 cents a box in 1902-1903. On the other hand,

the price of oranges per box in the east in the latter year ranged from \$1.75, when the market was glutted, to \$3 for the best grade during the Christmas holidays. The average price in the East that season was approximately \$2.20 per box. The rate of \$1.25 per hundred pounds is equal to 90 cents per standard box of 72 pounds. This added to the above estimated cost of \$1.10 for production and placing on board cars makes a total of \$2 per box. This does not include the cost of refrigeration in transit. The testimony, though by no means uniform as to cost of production and prices, fairly warrants the use of the foregoing as approximate figures. The estimate of cost to the grower is low rather than high and liable to be increased by frost, ravages of the scale pest and deterioration of the groves. To this may be added something for increase in the cost of labor.

The rate of \$1.25 has been in effect approximately the whole time since this citrus fruit industry became the subject of any considerable movement by rail to eastern cities. It is as high today upon oranges (which constitute the great bulk of citrus fruit shipments) when the shipments aggregate between 20,000 and 30,000 cars annually as it was when but a few hundred cars were moved during the season and when the rate as applied to that movement was low. The climate and extreme fertility of the soil when irrigated induced numerous persons to settle in Southern California and engage in the production of citrus fruits when the business was much more profitable, and even now the climate, soil and pleasant character of the occupation serve to attract new settlers, resulting in a constant increase of the acreage. The citrus fruit business in Southern California has developed into an industry of great magnitude from which the carriers derive a large and growing traffic, shipped only in carload lots loaded by shippers and unloaded by consignees, which is steadily offered for shipment and which the carriers can arrange to move during the season from November to August, with the bulk of the crop often moving in train loads in the four months, December to March, inclusive.

Besides the considerable additions to net revenue due to the increase in the tonnage afforded by this traffic, the carriers by
10 I. C. C. REP.

using larger cars and increasing the minimum weight of carloads from 20,000 to 26,000 pounds have added \$75 per car to their revenue from this industry. The rental paid by these carriers for the use of the ventilator-refrigerator cars used in the traffic has been reduced more than one half. The mileage which was formerly three-fourths of a cent both ways is now six-tenths of a cent per mile on the Southern Pacific and it applies only to the east-bound haul, unless the cars are loaded on the return trip. The Santa Fe Refrigerator Despatch which furnishes the cars for use on the Santa Fe System is owned by that system. Though not shown in this case, it is understood by the Commission that the car line receives more than six-tenths of a cent per mile for its cars from eastern connections of the Southern Pacific, and even obtains as much as one cent per mile for the distance between the Missouri River and Chicago. A fair approximate average is three-fourths of a cent per mile.

During the period of seven or eight years prior to 1900 large rebates were paid amounting generally from \$15 to \$25 per car, and though often paid by the car lines they must be regarded as deductions to the shipper from the amount paid for transportation. Whether any of these rebates were paid by the defendants, who are the initial carriers, or whether they were paid by their eastern connecting lines, or by the car lines, the fact is that the net cost of transportation to the shipper was to that extent reduced, and discontinuance of the rebates increased the cost of transportation to the shipper. The amount paid by the shipper is what is being treated in this particular connection. Such a deduction of \$20 per car is equal on a shipment of 26,000 pounds to about eight cents per hundred.

The carriers take much greater time in transporting these perishable fruits to eastern markets than they did prior to 1900. The dilatory character of the service has aroused general complaint and this complaint was voiced by nearly every shipper who testified in the last investigation. The schedule time from San Bernardino, a collecting point in the fruit section of Southern California, to Chicago is eight days and to New York twelve days. The time actually consumed is much greater, very often reaching fifteen days to Chicago and twenty days to New

York. Prior to 1900 the usual time was according to the schedule mentioned. When citrus fruit cars are side-tracked the ventilation is reduced to a minimum in comparison with the free circulation of air caused by the moving train, and the side-tracking for days at a time, as has sometimes been the case, inevitably results in damage to the product. These transportation delays beyond the practicable schedule time began about the date when the exclusive routing regulation was made effective in January, 1900, and have continued ever since. The defendants assert that such unexpected conditions as congestion of freight through unprecedented traffic offerings, want of motive power, lack of water, strikes and even an epidemic of grippe among the employees, have caused the delays and that notwithstanding such conditions the citrus fruit traffic has been preferred over other freight. The congestion caused by heavy traffic is the only one of the excuses given which has material weight and during a period of three or four years that condition could have been largely changed. The additional time of transportation to New York and Chicago for so long a period indicates a practice of providing slower train service and consequent reduction of cost to the carrier. Shippers were paid for damages to the fruit caused by delay in transit in 1900-1901 the sum of \$54,000 by the Santa Fe and \$32,000 by the Southern Pacific. Notwithstanding the payment of these claims and smaller amounts in later years there has been no improvement in the service. The fruit should reach the market in as fresh condition as possible, and if the rate should remain as it is with an eight day service to Chicago and a twelve day service to New York and proportionate train service to other destinations, it would be as much to the advantage of shippers as a small reduction in the rate and leaving the time of service fifteen days to Chicago and twenty days to New York.

Some of the delay must, in justice to the carriers, be ascribed to the great number of diversions of freight in transit which are made upon the request of shippers. These diversions from the original to a new destination after the car has left the point of shipment, and which are made to reach a better market for the fruit, entail considerable expense upon the carriers for

10 I. C. C. REP.

which they do not receive compensation in addition to the rate. In April, 1903, a large number of growers organized the Southern California Fruit Agency. This agency has contracted with about 80 per cent of the growers to market their product. The object of the agency is to cheapen the handling of the fruit and accomplish distribution according to the actual demands of the markets. The agency has selling agents in numerous eastern localities. This method of marketing is intended to greatly reduce the number of diversions in transit.

Fully 60 per cent of this citrus fruit traffic goes east of the Mississippi River. The geographical center of the distribution is estimated by a witness for defendants as in the region of Buffalo, N. Y., but with only 60 per cent of the tonnage carried east of the Mississippi, the actual average length of haul would seem to be considerably shorter than the distance to Buffalo. The distance to that point is about 2700 miles by the Santa Fe and connections and about 3000 miles via the Southern Pacific and connections. For those distances the rates per ton per mile are by the Santa Fe 9.26 mills and by the Southern Pacific 8.33 mills. The rate per ton per mile by the Santa Fe to Kansas City, 1747 miles, is 1.431 cents, and to Chicago, 2205 miles, it is 1.134 cents. By that line and its connections the rate per ton per mile to New York, 3117 miles, is 8.02 mills. The total receipts from the 20,724 cars of citrus fruit carried east in 1902-03 were, based upon the minimum carload of 26,000 pounds and the \$1.25 rate, \$6,735,300, of which the Santa Fe and connections received \$3,496,350 and the Southern Pacific and connections received the remainder, \$3,238,950. The Santa Fe system has a long haul and its share averages \$1.05 per hundred pounds out of the \$1.25 rate, equal to \$273 per car, or a total of \$2,936,934 for the year 1902-03. The Southern Pacific with shorter haul averages about 52 cents per hundred pounds, or \$135 per car, and in that year it received a total of \$1,345,410.

A reduction of 15 cents per hundred pounds in the rate of \$1.25 would on the basis of that year's movement reduce the total receipts for all lines participating in this entire traffic \$808,236. Such a reduction would tend to increase the ton-

10 I. C. C. REP.

nage. The increase in the minimum carload weight, amounting to \$75 per car, added to the decrease in mileage paid by the railroad for the use of the refrigerator cars (amounting to $7\frac{1}{2}$ mills on the westbound haul and, on a basis of 2200 miles to Chicago, to \$16.50) gives a total reduction in cost to the carriers of \$91.50 per car. That sum, using the minimum carload of 26,000 pounds per car, represents 35.19 cents per hundred pounds.

These reductions in cost to the carrier are subject to whatever deduction is warranted by the increased dead weight of the refrigerator cars and any additional cost of operation and maintenance. The increased value of the refrigerator car and a considerable portion of the expense for repairs are items covered by the rental paid for the use of the car. A large percentage of the refrigerator cars used in this traffic are returned empty and hauling these empty cars is another element of cost to be considered. On the Southern Pacific the mileage of loaded freight cars was about 71 per cent of the total car mileage in the year ending June 30, 1903, and it appears from the testimony that the refrigerator cars used on that line in the citrus fruit traffic are loaded for only about 57 per cent of the miles run.

The fourth vice-president and general manager of the Southern Pacific Company put in as part of his testimony a statement containing figures intended to show that his company loses money in the transportation of citrus fruits over the line from Los Angeles to Ogden and only comes out about even when it carries citrus fruit over its line from Los Angeles to El Paso. The statement is based upon figures giving the cost of transporting all freight and of the citrus fruit traffic over each of the two lines operated by the company. One obvious error in this statement is that it compares the orange traffic passing over the full length of its road with all traffic through and local of every description and going in both directions over the line. The basis upon which these figures as to cost to the company were ascertained is not shown, and the Commission, though entirely familiar with the accounting methods of the railways, is unable to conjecture what basis could be employed to arrive at

10 I. C. C. REP.

even an approximately accurate estimate of the cost of transporting all freight or any particular kind of freight over any railroad. Expert railway accountants agree generally that the proportions of total operating expenses assignable to freight and passenger service cannot be ascertained or even fairly estimated. The Commission formerly required carriers to report estimates of the cost of the two services according to the freight and passenger mileage after assignment of those expenses belonging exclusively to each of the two great divisions of traffic, but this requirement was discontinued by the Commission after careful consideration and as the immediate result of the investigation and report by a committee of the National Association of Railway Commissioners in 1892, which found the apportionment of expenses to be merely an arbitrary division and without value, and stated that the opinions of the railway accounting officers were practically unanimous in favor of discontinuing the attempt to apportion expenses between passenger and freight traffic. For these reasons this statement is insufficient and unreliable as a showing of the cost of transporting over the Southern Pacific all freight and the particular traffic herein involved.

The statement referred to sets forth that the average number of gross tons per train of dead and revenue producing freight in the fiscal year ending June 30, 1903, on the Los Angeles-Ogden line was 788, of which 369 tons were revenue producing, the remainder representing the weight of the cars, that is to say, that for every ton of revenue freight 1.14 tons of dead weight were hauled. On the Los Angeles-El Paso line the gross tons per average train were 891, of which 400 were paying freight, indicating 1.23 tons of dead weight to every ton of revenue freight. On oranges and other citrus fruit the statement gives for both branches of the system 2.70 tons of dead weight for each ton of paying freight. This calculation includes $2\frac{1}{2}$ tons of ice per car on the assumption that 50 per cent of the citrus fruit traffic is shipped under 5 tons per car refrigeration. The refrigerated citrus fruit cars from the season of 1897-98 up to March, 1903, on the Southern Pacific were a little under 29 per cent and on the Santa Fe about 32.6 per cent of the whole number carried during that period. For

10 I. C. C. REP.

the purposes of this case, however, the foregoing figures as to dead and paying weight are taken as approximately correct.

Unquestionably the citrus fruit traffic, as well as other perishable freight requiring care, refrigeration and expedition in transit and the carriage in heavy refrigerator or ventilator cars, does cost the carrier more to transport than ordinary freight. If it did not there would be no conditions upon which to establish higher rates on the perishable freight. The annual report of the Southern Pacific for the year ending June 30, 1903, contains some items which, taken in connection with the testimony in the record, bear upon this difference in cost.

The average number of tons of freight in a car was 18.43 and the number of tons in a car of citrus fruit was and is 13. The average number of tons of freight in a train was 345.61 and the number of tons of citrus fruit in a train, counting 28 cars to the train, was and is about 364. The average distance haul per ton was 285.01 miles. The distance haul of citrus fruit over the Southern Pacific was practically the full length of the two lines of that company—Los Angeles to Ogden, 1196 miles, and Los Angeles to El Paso, 813 miles. This indicates that although the rate per ton per mile on citrus fruit may be low the actual revenue is much greater than that from ordinary freight. The total freight revenue was \$35,468,698.86 and the revenue from citrus fruit was \$1,345,410. The citrus fruit traffic alone yielded the Southern Pacific over one twenty-sixth of its total freight revenue. The aggregate freight tonnage was 14,018,797 tons and the citrus fruit tonnage only about 129,558 tons. The average revenue received for each ton of freight (including citrus fruit and all other traffic) was \$2.53, while the company received over \$10 for each ton of citrus fruit hauled over its lines, or about four times as much per ton for citrus fruit as for all freight.

The Santa Fe System roads file separate reports, and it is therefore impracticable to make similar comparisons for that system.

The report for the same year of the Atchison, Topeka & Santa Fe proper, extending from Chicago to Albuquerque with numerous branches, shows that it received in the same year an
10 I. C. C. REP.

average of $\$2.70\frac{2}{3}$ for each ton of freight. The Santa Fe System obtained from the transportation of this citrus fruit \$21 per ton. While the cost of transporting the citrus fruit traffic is largely in excess of the average cost of transporting freight generally on each of the defendant systems, such difference in cost is far exceeded by the difference in freight revenue, and considering in addition the volume of this traffic, its steadiness, its frequent movement in train loads, at least over the initial lines, and the loading by shippers and unloading by consignees, we find that citrus fruit shipments constitute a highly desirable and profitable traffic for the defendant carriers.

The citrus fruit traffic is not, however, under the present rate as applied to the gross weight of the loaded car, as profitable to the defendants *per car* as a number of other freights, for example, beans, canned goods and dried fruits; and canned goods are shown in testimony to yield greater train revenue, based upon the gross weight of the loaded car than is afforded by citrus fruits. This results from the use in late years of the larger car of 60,000 pounds capacity in ordinary traffic instead of cars formerly used having much smaller capacity, thereby cheapening the cost of carriage.

Compared with class rates from Pacific Coast terminals, the \$1.25 rate on oranges is more nearly equal to the Class C rate, which is graded from \$1.10 at Missouri River points to \$1.30 at New York. The commodity carload rates from Pacific Coast terminal points to New York range from 75 cents up to \$2.75, but the majority of these carload rates are below \$1.25, the rate on oranges. The class and commodity rates from Pacific Coast intermediate points to the East are upon a much higher basis than those from the Pacific Coast terminals.

The rates charged by defendants on deciduous fruits and green vegetables, both of which kinds of freight are more perishable than oranges, lemons and other fruits of the citrus variety, are the same as contained in our former report in this case, to-wit: Deciduous fruits, estimated weights per box or crate, 26,000-pound minimum carload weight, owners' risk,—\$1.25 per 100 pounds to Colorado, Texas, Missouri River and Mississippi River points, Chicago, St. Paul and Minneapolis;

10 I. C. C. REP.

\$1.50 to New York, Philadelphia and Buffalo; \$1.56 to Boston. Green vegetables, 20,000-pounds minimum carload weight, owners' risk,—90 cents per 100 pounds to Missouri River points and points east thereof up to and including Chicago and common points. Rates east of Chicago are not shown in tariffs. The clause providing a passenger train service for green vegetables at a rate of \$2 per 100 pounds was cancelled by subsequent tariffs.

A table introduced on behalf of defendants compares the rates per ton per mile on Florida and California oranges to 40 cities, and shows higher rates per ton per mile upon the Florida than upon the California product. The distance to New York from Los Angeles, Cal., is about 3000 miles and from Jacksonville, Fla., 982 miles, or less than one-third of the distance from Los Angeles. The table gives rates per ton per mile to New York of 7.9 mills from Los Angeles and 13.8 mills from Jacksonville. Rates per ton per mile commonly decrease as distance increases, and the difference in these ton-mile rates is more than accounted for by the disparity in the distances. The table does not give the actual rates per 100 pounds from Florida, but higher rates are there stated based upon a difference as between California and Florida in the size of the box and the number of pounds per box. The Florida orange is carried usually at specified rates per box of 80 pounds with minimum carload weights much lower than that in force on California oranges. The actual rates per 100 pounds should be used in any comparison. The actual 100-pound rates on Florida oranges to Northeastern cities are four or five cents less than those used in the table. The actual rates per hundred pounds on Florida oranges and the distances from Jacksonville, Fla., to Washington, D. C., and New York are: Washington, 59 cents, distance 755 miles; New York 63 cents, distance 982 miles. The difference in distance is 227 miles and the difference in rate 4 cents. If 59 cents is taken as the rate for 750 miles on California oranges, and that rate increased 4 cents with each 225 miles, the rate for 3,000 miles, the approximate distance from Los Angeles to New York, would be 99 cents, instead of \$1.25, the rate here complained of as unreasonable. Such comparison is perhaps the

10 I. C. C. REP.

most unfavorable to the defendants than can be made with the rates and distances involved under the table mentioned, but it demonstrates that, considering the distance, the rates on Florida oranges to Washington and New York are adjusted upon a lower basis than the rate on California oranges to New York and intermediate points, and the use of that comparison is warranted in far greater degree than a comparison of the rates per ton per mile computed over long and short distances. The volume of citrus fruit shipments from Florida is small compared with the volume of citrus fruit shipped from California. Tables submitted on behalf of complainants show calculations based upon the distance tariffs of the Georgia, Texas, Iowa and Illinois Railroad Commissions, which indicate how rates per ton per mile commonly decrease with distance. The calculation based upon the Iowa distance tariff and which is, of course, simply illustrative, shows a rate per ton per mile of $6\frac{1}{2}$ mills and a rate of $81\frac{1}{4}$ cents for 2500 miles. The orange rate of \$1.25 per ton per 100 pounds affords a rate per ton per mile of one cent for 2500 miles. All of the foregoing comparisons must be considered in connection with the universally recognized rule that the greater the tonnage the less should be the rate applied upon a particular article, and with the further generally applied principle that the longer the distance the less should be the rate per ton per mile. One cent per ton per mile would afford an extremely low aggregate rate upon oranges for a distance of 500 miles, but for a distance of 2500 miles it yields a high rate upon that commodity, which, though semi-perishable, is carried frequently in train loads, and furnishes a large and constantly growing aggregate tonnage and revenue to the carriers.

The statistical reports issued by the Commission based upon annual reports of the carriers, show that, taking all the railroads in the United States, the net income from operating after deducting operating expenses increased from \$349,651,047 in 1895 to \$643,308,055 in 1903, and that per mile of line such net income increased from \$1,967 in 1895 to \$3,133 in 1903. The net income from operation of the Atchison, Topeka & Santa Fe Railway Company has increased since 1895 from \$4,432,919

to \$16,105,703 in 1903, and the net income per mile of line for the same period from \$967.44 to \$3,315.58. The net earnings from operation of the Southern California Railway (part of the Santa Fe System) increased from \$303,339 in 1895 to \$1,562,174 in 1903, and the net earnings per mile of line advanced from \$617.82 to \$3,266.91. On the Santa Fe Pacific (part of the Santa Fe System and which filed its first report in 1898) the net income was \$463,055 in 1898, and \$2,978,413 in 1902, and the net income per mile of line was \$565.70 in 1898 and \$3,354.10 in 1902. In 1903 the Santa Fe Pacific operations are reported as part of the Atchison, Topeka & Santa Fe Coast Lines. The Southern Pacific Company (Pacific System, including the Central Pacific) shows net income from operation in 1895 of \$12,050,214 and \$21,195,802 in 1903. The net income per mile of line was \$2,269.25 in 1895 and \$4,037.43 in 1903. The net income per mile of line of all these defendant roads for the year 1895, except the Southern Pacific, was much lower than the average for all roads in the United States, but the net income per mile of line in 1903 for each of the defendants, including the Southern Pacific, was considerably in excess of the average in that year for all roads in the United States. The percentage of operating expenses to earnings in 1903 for the Southern Pacific was 62.88; the Atchison, Topeka & Santa Fe, 58.19; the Southern California, 59.55, and the Santa Fe Pacific (including also the San Francisco & San Joaquin Valley) 62.35. The average for the whole United States was 66.16 per cent.

The Southern Pacific is a lessee company and does not own any railroads. A statement put in evidence by that company specifies a total capitalization of \$549,859,397 on January 1, 1903, covering all railroads and steamship lines in both the Pacific and Atlantic Systems of the company. This was an increase of \$15,489,142 over January 1, 1901. The annual report of the company to the Commission for 1903 represents the amount of stock outstanding as \$197,849,258.64 and shows payment of operating expenses, interest on funded debt of \$51,562,500 amounting to \$2,003,260, and other payments as fixed charges, including \$21,519,003.32 as "rents paid for lease of 10 I. C. C. REP.

road." These payments reduced the surplus from \$10,176,309.12 to \$9,072,547.94. The actual financial condition of the company in some respects is not definitely determinable from the record. It is plain, however, that the great increase since 1895 in its net earnings, both in the aggregate and per mile of line operated, places it in far better condition than it was in that year. Its net income per mile of line was greatly higher than that of any of the other defendants. Such net income per mile of line exceeded the average for all roads in the United States in 1895 by \$302 and in 1903 the excess above the average was \$904. The total assessed value of roads in the Pacific System of the Southern Pacific Company running through California, Nevada, Utah, Arizona and New Mexico was \$61,321,747 in 1901. In Utah, Nevada, California and New Mexico the assessed valuation does not average more than 50 per cent of the true valuation and in Arizona it does not exceed 40 per cent. On the basis of 40 per cent assessed valuation the full value of the properties would be \$153,303,867. The income from operation of the Southern Pacific for the fiscal year 1903, amounting to \$21,195,802.27, would be about 13.8 per cent of such valuation.

While these roads are, as compared with the average for all roads, yielding extraordinary returns, the orange industry which furnishes them a large, constantly growing and profitable class of traffic is yielding small and sometimes little or no profit to the growers. The facts hereinafter stated with reference to the suppression of competition by the defendants are here referred to as bearing upon the reasonableness of the transportation charge. The rate on lemons is \$1.25 per 100 pounds, having been made \$1.00 for most of the shipping season, the transportation rate applied to that commodity does not appear to be unreasonable. The rate of \$1.25 per 100 pounds upon oranges is unreasonably high and works injustice to growers of that fruit in California. A moderate reduction would be 15 cents per 100 pounds. If the time of service to eastern points should be reduced to the basis of 8 days to Chicago and 12 days to New York, a somewhat less rate reduction would afford a

10 I. C. C. REP.

reasonable charge, but the reduction in that case should be at least 10 cents per 100 pounds.

The defendants, with their connections, have made the rate of \$1.25 per 100 pounds effective as a blanket rate to destination points in all that great territory east of the Missouri River, including points on that river. If we taken a point in the eastern or more distant part of this territory as a basis, the rate would appear to afford a low rate per ton per mile, as compared with the rate on the same or like articles elsewhere. On the other hand, if we take a point on the Missouri River, or in the western part of this territory, the rate per ton per mile will be found very much higher and in excess of other rates on the same or similar articles in other parts of the country and in the territory still farther west, including Denver and other important points, although the rates to that territory are not directly involved in this proceeding and are somewhat less in the aggregate than those in question, they will show even still higher rates per ton per mile. There is little, if any, testimony as to the propriety or justification of a blanket rate covering so great a territory as that between the Missouri River and the Atlantic Seaboard. In dealing with such a rate we must consider and give weight to the conditions existing at the nearby destinations as well as those at the more distant points in the territory affected, and any finding as to the correction of the rate complained of in this case must be based upon the territorial application established by the carriers themselves for the existing charge. While the rates to intermediate points west of the Missouri River are not attacked in this proceeding, putting into effect the above stated reduction would involve whatever readjustment of intermediate charges the circumstances and conditions may require.

The Minimum Carload Weight.

As found in the first report on this case, with the 40-foot car in use any damage to the fruit from overloading, or rather from putting too much of the fruit in a given space, is apparently obviated. The minimum weight was increased from 24,000 to 26,000 pounds in 1899. A 40-foot car will contain 26,000 10 I. C. C. REP.

pounds and leave sufficient room for ventilation, and a greater weight up to 27,648 pounds is often loaded in such a car. A 34-foot car loaded with the minimum weight does not afford sufficient ventilation. About 75 per cent of the ventilator-refrigerator cars on the Southern Pacific and about 80 per cent of those on the Santa Fe are 40-foot cars. The use of the larger car seems to have satisfied this branch of the complaint. A smaller load could be used to greater advantage in various markets, but the testimony does not indicate any such resulting prejudice from the requirement of 26,000-pounds minimum carload as to warrant a finding that such requirement is unreasonable.

The Charges for Refrigeration.

The Southern Pacific does not own the ventilator-refrigerator cars used in its citrus fruit traffic but contracts for its supply of such cars with the Armour Car Lines Company. The contract for these cars entered into on October 10, 1902, and effective November 1, 1902, runs for three years. The Armour Company agrees to furnish the Southern Pacific with as many refrigerator cars as it may call for in its business from time to time up to the number of 5,000. The Southern Pacific hauls and distributes the cars, but the Armour Company provides the ice and labor for refrigeration, is permitted to fix the refrigeration charges and keeps the interior of the cars in repair. Under the contract the Southern Pacific can only use the Armour cars in the transportation of this fruit while its demand is below the number specified in the contract. As above found, the railway company pays the Armour Company for the use of the cars at the rate of six-tenths of a cent per car per mile on eastbound traffic and the same mileage on westbound traffic when the cars are loaded. Another provision in the contract is that the charge for refrigeration fixed by the Car Line shall be reasonable and that the charge may be billed as an advance charge by the railway for the Car Line's account or by making draft on the shipper or consignee therefor. The Southern Pacific uses about the same number of Armour cars each season as the Santa Fe does of the cars used upon its line.

The cars used for the transportation of citrus fruit upon the
10 I. C. C. REP.

Santa Fe system are controlled by that system. In 1902 a corporation known as the Santa Fe Refrigerator Despatch Line was formed in Kansas with a capital stock of \$5,000 all of which is owned by the Santa Fe Railway Company. The officers of the Despatch Line are under the control of the officers of the Santa Fe System, who practically fix the charges for refrigeration and direct the distribution of the cars. The Santa Fe Refrigeration Despatch cars are used on various lines throughout the United States. About 3,500 of such cars are in service upon the Santa Fe. They are valued at about \$3,500,000. The total earnings for the seventeen months ending November 30, 1903, were \$752,967.78 and the total operating expenses for that period were \$713,719.89, leaving a profit of \$39,247.89. The average time consumed in hauling the loaded refrigerator car from Southern California to eastern points and returning the car to Southern California is about 65 days.

The contention that these refrigerating charges are not subject to regulation by the Commission was made at the outset of this proceeding when the Santa Fe System was not in control of the cars used in this traffic, and in this connection it should be noted that shippers are not permitted upon either line to furnish their own cars or to furnish the refrigeration for the cars used in transporting their traffic.

The following table shows the charges for refrigeration upon oranges and lemons from Southern California points to eastern destinations at the time of the original hearing in 1900 and at the date of the further hearing in 1903. These charges are the same whether the shipments are made by the Santa Fe or Southern Pacific.

SUMMER REFRIGERATING CHARGES.

From California Points To	1900. Per car.	1903. Per car.
Denver, Leadville, Pueblo, Salt Lake	\$ 50	\$ 50
Butte, Council Bluffs, Omaha, St. Joseph, Kansas City, Dallas, Fort Worth,	60	60
Houston, San Antonio, Burlington, Des Moines,	70	62.50
Chicago, St. Louis, Sioux Falls, Minneapolis,	75	62.50
Evansville, Indianapolis, Fort Wayne, South Bend,	80	67.50

From California Points To	1900. Per car.	1903. Per car.
Buffalo, Detroit, Cleveland, Cincinnati, Fargo, Memphis, Toronto, Wheeling,	85	72.50
Albany, Atlanta, New York, Baltimore, Montreal, Philadelphia, Washington,	90	75
Boston, Hartford, Providence, Portland, St. Johns, N. B.,	95	77.50

These reductions, ranging from \$7.50 to \$15, are substantial. They result, for example, in lower charges of 3 cents per box to Chicago and 4 cents per box to New York. The winter charge for refrigeration appears from the testimony of one witness only to be about \$7.50 per car less than the summer charge. The actual cost of the ice delivered in the car tanks is stated in testimony to be \$47.04 when the car is destined to the \$50 group shown in the foregoing table; \$54.32 for the \$60 group; \$55.10 for the \$62.50 group; \$58.55 for the \$67.50 group; \$62.50 for the \$72.50 group and \$64.53 for the \$75 group. The refrigeration charges are expected to cover the cost of ice, extra repairs to car and tanks, dead space in the car occupied by the tanks, investment in ice houses and shrinkage in the ice. This statement of items covered by the refrigerating charge was given by a witness in the employ of the Santa Fe system and the item "dead space in the car occupied by the tanks" evidently means that the Santa Fe System figures upon obtaining from the icing charge a return sufficient to compensate it for loss of revenue resulting from the space in the car occupied by ice which might otherwise be used to carry paying freight. Upon the Southern Pacific where the cars are owned by the Armour Car Lines that item of revenue covered by the icing charge does not go to the railway company. 4½ to 5 tons are placed in the tanks when the loaded car is started. The price in California is about \$4.50 per ton. The cars are re-iced in transit when necessary and no serious complaint is made of the efficiency of the icing service.

The refrigeration charges now applied over either of the defendant lines upon this traffic are, in proportion to the distance the traffic is hauled, much lower than those imposed upon fruit

traffic between points east of the Mississippi River where the cost of ice is much less than it is in California or in numerous localities west of the Missouri River upon the lines of the Southern Pacific and Santa Fe Systems.

In view of the reductions in the refrigerating charges since the first hearing of these cases, and the insufficiency of the evidence as to cost of icing the cars, we do not feel justified in condemning the present refrigerating charges as unreasonable. The general subject of the use of cars owned by so-called car lines, including charges for refrigeration, is involved in another investigation by the Commission.

The Pooling Issue.

In Southern California about 88,000 acres are planted in citrus fruit. The Southern Pacific line is practically the only carrier for the product of about 27,000 acres and the Santa Fe is located so that another 27,000 acres are tributary to its line. The remaining territory, 34,000 acres, is served by both lines. Calculated according to the acreage each line is the sole carrier for 30 per cent. of the product, and about 40 per cent. is subject to competition between the two lines. The producing territory is therefore about equally divided as between the two initial systems, and this must constitute the basis of defendants' claim that the traffic naturally divides itself equally as between the two initial carriers. The claim cannot rest upon the tonnage actually carried in preceding years, for if that business was, on the one hand, the subject of competition, or was, on the other hand, divided according to agreement, the proportions of the whole tonnage carried by the Southern Pacific and Santa Fe could not have come *naturally* to their lines.

The Santa Fe has the shorter line to the East and is preferred by shippers for the carriage of a large part of the traffic. On the other hand, the Southern Pacific having a northerly line to Ogden and a southerly line to El Paso and New Orleans has the greater number of connections and shippers frequently find its routes the more desirable. Each of the initial carriers is well equipped in all respects to compete actively for this citrus fruit traffic, but they find their financial interest best promoted by an

10 I. C. C. REP.

equal division of the business. Taking the citrus fruit tonnage carried by each for a period of seven years the Santa Fe carried but little more than the Southern Pacific; and the tonnage necessary to be transferred from the Santa Fe to the Southern Pacific to give the latter an exactly equal share amounts to less than 86/100 of 1 per cent of the whole tonnage carried by both lines. Prior to 1900 the initial and connecting carriers all competed strongly for this traffic in service and other facilities and the competition also involved substantial rebates from the established cost of transportation to the consuming markets. That competition resulted in about the same amount of tonnage going over each of the initial lines. In 1900 the defendant initial carriers, acting in concert, undertook to insure the continuance of this equal division of the traffic and maintenance of the rate both as a tariff charge and as actually applied to the business and to prevent the drains upon revenue caused by active competition. They made the tonnage previously carried by each the basis of the understanding or agreement.

The understanding, arrangement, agreement or combination, as it is variously termed, involved the establishment of certain conditions which will now be described. They put in a new tariff on citrus fruits. Each of the two systems with its connections constitutes a separate and independent line and with such connections it can put in force a separate joint tariff. These initial systems chose, however, to associate the lines together in a single joint tariff. As the result of a conference held in San Francisco in October, 1899, the initial carriers and their direct connections instructed Mr. R. H. Countiss, Agent of the Associated Transcontinental Lines, to issue a notice to all lines participating in the traffic that effective November 15, 1899, the existing citrus fruit tariff would be canceled and a new tariff put in force in connection with specified routes comprising roads that should give express assurance that they would not deviate from the rates provided therein, directly or indirectly, by any method or device, whether in conjunction with carriers, shippers, consignees or car-lines; that each road in consideration of being made a party to the new tariff must give its assent in advance to the cancelation of such tariff in the

event that the rates should not be absolutely maintained by it as above required; that the absolute and unqualified right of routing beyond its own terminal should be reserved to the initial carrier; that indefinite or evasive responses would be considered as indicating an unwillingness to give the desired assurances. A circular issued by telegram to connecting lines on December 19, 1899, signed by Wm. Sproule and W. A. Bissell, Freight Traffic Officials respectively of the Southern Pacific and Santa Fe Systems, reads as follows:

"On and after January first, nineteen hundred, California terminal lines have made arrangements for routing the citrus traffic from California through to final destination. Have further arranged that no diversions shall be made without consent of terminal lines and have notified the car lines interested, who are agreeable to the changed conditions. From this action you will see that if any special arrangements have been made by any lines east of Chicago or St. Louis looking to the control of the business either through car lines, shippers or any other source, that the results expected cannot be obtained thereby, and we would respectfully suggest their cancelation. This result you will see is in line with giving the legal protection contemplated to all shippers alike and protecting your interests in the traffic at full tariff rates."

The agreement to absolutely adhere to and keep in effect the tariff rate and give the initial carriers full control of the routing was made and the new tariff was established by Agent Countiss. It again put in force the \$1.25 rate and reserved the routing of the traffic to the initial lines. Each of the initial carriers also allotted to its various connections certain percentages of the citrus fruit traffic. A copy of the circular to local agents containing instructions of the Santa Fe System as to routing according to such percentages is set forth in the findings shown in our first report of this case.

The defendants insist strongly that the provision reserving the power to route the traffic was adopted to enable the initial carriers to prevent the payment of rebates by eastern lines. The law prohibits the rebate practice, and it was claimed without contradiction that rebates had not been paid from the revenues.

10 I. C. C. REP.

of these initial carriers. The preference of shippers for transportation by particular lines in the east, which would be given effect if their right to route the freight as they desired should be recognized, could operate to materially increase the tonnage on one or the other of the initial systems and thereby greatly hamper the equal division of traffic between these systems. This routing provision in the association joint tariff, it must be remembered, operated not only to deny the shipper's right of routing but to vest in the initial carrier the authority to fix and enforce the percentage of the business that each connecting carrier should receive. The strenuous efforts made by the initial carriers to obtain by agreement of all participating lines "the absolute and unqualified right of routing" indicates that the provision was designed to directly and substantially serve their interests, and it would do that by aiding their efforts to force as between themselves an equal division of the business. They would have no such direct and substantial interest in the suppression of rebate payments by eastern lines.

The initial carriers limited the quantity of ventilator-refrigerator cars each would provide to such number as would enable each of such carriers to move 50 per cent of the citrus fruit traffic. Whenever a shortage of cars occurred on one line the cars of the other would be supplied, but the cars would be routed over its line. For example, if a shipper could not get a Santa Fe car, a Southern Pacific car would be furnished and it would be routed over the Southern Pacific instead of the Santa Fe, although the shipment would be delivered to the latter company for transportation.

Under the operation of these conditions, all arbitrarily established by the initial carriers, these citrus fruits are pooled and divided by them in substantially equal shares as completely and effectively as if all of these freights had been actually assembled at one time and divided between them in equal parts. Competition between the two systems has been suppressed or at least so diminished that merely a semblance remains, and as the percentages of the connecting lines are fixed the usual inducement to furnish prompt service is removed. The independent activity and desire for increased business which ordinarily

operate to induce competing railroads to reduce the transportation charge have been completely removed in the case of this citrus fruit traffic, and only in the event that the carriers are threatened with loss of traffic (as indicated by the reduced lemon rate) is a voluntary reduction in rate to be expected.

CONCLUSIONS.

The minimum carload weight of 26,000 pounds is not found unreasonable with the 40-foot refrigerator car in general use.

Much has been said in the argument of this case upon the question whether the Commission has jurisdiction of the refrigeration charges on citrus fruit from Southern California. Whether or not the Act applies to refrigeration charges in all cases, we think that the railway companies, by compelling shippers to pay the icing charges established through the car lines or do without necessary refrigeration for their traffic, have made these charges part of the shippers' cost of transportation and subject to regulation under the law. Like ruling was made in our recent decision "*In the Matter of Charges for the Transportation and Refrigeration of Fruit Shipped from Points in Michigan on the Pere Marquette and Michigan Central Railroads*," 10 I. C. C. Rep. 360. The present refrigeration charges from Southern California are not found upon the record made herein and for the reasons stated in the findings to be unreasonable.

The defendants are found to be engaged in pooling this citrus fruit traffic from Southern California to eastern destinations. The arbitrary power of routing assumed and exercised by them has already been held unlawful by this Commission (*Consolidated Forwarding Co. v. Southern P. Co.*, 9 I. C. C. Rep. 182), and has also been condemned by the Circuit Court of the United States as operating in connection with the acts of defendants to constitute a traffic pool prohibited by Section 5 of the Act to regulate commerce (*Interstate Commerce Commission v. Southern P. Co.*, 132 Fed. 829). This unlawful pooling of freight is further aided and rendered successful by the action of the defendants in so limiting the car equipment supplied for these freights that it will move on each line no more than about one-half of the traffic. The Santa Fe and 10 I. C. C. REP.

Southern Pacific are able to control this citrus fruit business, and divide it equally between them. All connecting lines must agree to keep in force and also maintain the present rate until the initial lines wish to change it, and the connecting lines must be content with obtaining such amounts of the traffic for carriage as they see fit to award. Tables giving certain percentages to the various competing eastern connections have been established by each of the initial carriers, and to enable them to carry those tables into effect, as well as to hold their equal shares of the business, they insist upon the absolute and unqualified power of routing these freights. Their equal shares are further insured by the quantity of cars which each shall provide for the business. With these conditions established and the co-operation of the defendants in their application, pooling the freight with a view to equal division is a matter of easy accomplishment. Under this arrangement and acts done under it the competition which the anti-pooling section of the statute was designed to preserve has been effectually suppressed.

The routing provision in the tariff as carried out by the defendants is, as above indicated, a main factor in this unlawful pooling arrangement, and as the action of defendants in originating and carrying out that provision has already been declared by the United States Circuit Court to constitute an unlawful pool, from which decision an appeal has been taken to the Supreme Court of the United States, it seems unnecessary in view of this judicial proceeding in which the matter is involved that another order should be issued by the Commission upon the same subject at this time. Further action upon this branch of the case is therefore reserved.

The rate of \$1.00 per 100 pounds now applied to lemons during most of the shipping season is apparently reasonable and we see no occasion to disturb the present charge on that commodity. The rate of \$1.25 per 100 pounds upon oranges is found unreasonable and unjust and in our opinion it should be reduced 15 cents per 100 pounds, but if the time of service to eastern markets should be restored to the old basis as indicated by 8 days to Chicago and 12 days to New York, a rate as high as \$1.15 would perhaps be fair and reasonable. An order will

10 I. C. C. REP.

be entered requiring the defendant carriers to cease and desist from further enforcing the present excessive and unlawful charge.

PROUTY, *Commissioner*:

I concur in the proposed order and recommendation of the Commission, but I do not agree with some of the facts found and conclusions drawn in the opinion and wish to state, therefore, the grounds of my concurrence.

Oranges are a luxury and the consuming market is necessarily limited. The area capable of producing oranges in California is more than sufficient to supply the consumption. Of this area some portions are much more favorably located than others and some years give better results than other years. Under these conditions it seems to me almost inevitable that there will exist an overproduction of this fruit which in average years and to the average producer will force down profits to a narrow margin, irrespective of what the rate of freight may be.

A reduction in the freight rate tends to reduce the price to the consumer and, therefore, to widen the market of consumption, and this in turn tends to increase the production. A reduction of 50 cents a box in the price of oranges in the East would undoubtedly add to the use of oranges, would bring them within the reach of some who had not enjoyed that luxury before, and by decreasing the price would increase the use by others. This would add to the area of orange culture in Southern California and to the wealth of that country. I doubt whether it would permanently benefit the individual orange grower.

In this respect there is a wide difference between oranges and lemons. The lemons which are consumed in the United States are largely imported from foreign countries through the Atlantic and Gulf ports. From these ports they are shipped by rail to the interior where they come into competition with California lemons; hence a reduction of 25 cents per hundred pounds in the freight rate may determine whether the merchant who retails lemons shall purchase the California or the imported article and such a reduction has, therefore, a very marked effect upon the consumption of California lemons not by increas-

10 I. C. C. REP.

ing the total consumption but by supplying that consumption from California instead of from foreign countries. Comparatively few foreign oranges are consumed in the United States during the period when the California fruit is in season so that a reduction in the rate on oranges only increases the market of the California grower by stimulating the use of oranges.

From this it follows that while a reduction in rate on the lemons from California may add sufficiently to the movement so that the total revenue of the railways is increased, a corresponding reduction in the rate on oranges would not have this effect. The average price of oranges for the season of 1902-03 was \$2.40 in eastern markets. The reduction proposed would amount to 12 cents a box. A box of oranges contains usually something more than one hundred. When it is considered that 12 cents a box only means about one cent per dozen in the wholesale price to the retailer it is evident that such a reduction could not materially affect the cost to the consumer, who usually buys by the dozen, and could not, therefore, materially add to the quantity of oranges consumed. The additional revenue derived from the additional movement would be nothing like the loss resulting from the application of the reduction to the present movement. While such a reduction would somewhat benefit consumers and would somewhat increase the production it would not, in my opinion, permanently benefit the orange grower and would very materially decrease the revenues of the carriers.

What the orange grower needs, *assuming that his rate is one which admits him freely to the eastern markets*, is a proper service. He requires first of all quick time. The orange begins to deteriorate the moment it is packed, and, in course of transportation across the continent, it is subject to the vicissitudes of heat and cold, depending upon the route and season of the year. In proportion as the time is shortened the opportunity for injury from these causes is diminished. Moreover the testimony shows that a car of oranges while standing still is not properly ventilated and that the fruit spoils much more rapidly than when the car is in motion. Of equal importance are regularity and uniformity. The shipper must know where his car of oranges is from day to day and he must be able to

determine when it will reach a particular market in order to place it to the best advantage. From all these it results that the quality of the service is of fundamental consequence in this traffic.

I did not hear the testimony taken in this case originally and have never examined that record carefully, but after the rendition of the first opinion I went to Los Angeles and there took the testimony of many orange growers. That testimony, as well as the representations of these gentlemen in private, was that the great fault to day lay in the service and that an improvement in the service was of more consequence than a moderate reduction in the rate. Several witnesses stated, as I now remember, that they would prefer the service of former years rather than a reduction of 10 cents per box. The testimony showed that formerly the time from points of production to Chicago was seven and eight days, whereas now it is from ten to twelve days, that to points east of Chicago it was even worse and the whole service there was utterly unreliable. I am of the opinion that the orange grower in California would gain much more by obtaining the service which he requires than by a reduction of 15 cents per hundred pounds, the service remaining what it now is.

It is approximately 2,200 miles from San Bernardino to Chicago by the short line. Some little time is needed to assemble these oranges and make up the trains ready to be sent east, but when once made up there is no further delay except in some instances for icing. A schedule of seven days between the packing house and Chicago would not mean an average speed of more than fifteen miles an hour. Live stock schedules from points west of the Missouri River to that river are from eighteen to twenty miles an hour. The peach schedule from Georgia to Alexandria is from twenty to twenty-three miles an hour. There is no reason why these oranges should not be handled at the rate of fifteen miles an hour, and why that time should not be actually made. If this schedule was actually in effect I should not be in favor of disturbing the rate of \$1.25 at the present time.

Probably, as stated in the opinion, the cost of transportation
10 I. C. C. REP.

to the carrier has declined since this tariff was originally put in effect. I do not think that, upon a proper analysis, the decrease is anything like as great as that given, nor do I think that it would be fair to charge the transcontinental lines, who are mainly interested in this rate, with the payment of rebates which the testimony shows were never paid or participated in by them; but still there is an actual decrease in cost for the reasons named and also because of the improved methods of transportation and the increase in traffic. On the other hand, the expenses of operation have very largely advanced in the last five years and many rates, among others transcontinental rates, have been advanced ostensibly for this reason. Assuming, however, that the cost of the service has actually become less I do not regard that as a sufficient reason for reducing this rate. The orange rate as originally established was a competitive rate intended to enable the California grower to meet first, the competition of Florida, second, the competition of the foreign producer. It has apparently accomplished both those purposes. The producer in California is certainly upon a level with the Florida producer in the matter of freight rates, and the foreign orange no longer comes into serious competition with the California product. It hardly seems to me just to make this competitive rate an absolute standard by which to measure a reasonable rate when the competition has disappeared under the operation of the rate.

There is great difficulty in reducing this rate upon the theory that it is inherently unreasonable. The rate of \$1.25 applies upon the Missouri River and to all territory east, and the testimony showed that the average haul of all oranges shipped to and east of the Missouri River was approximately 2,700 miles. The service, for reasons well understood, is an expensive one to the carriers, *if properly performed*. There is great difficulty in saying upon any fair basis of comparison that such a service as I have indicated is not reasonably worth the price now charged. A short time ago this Commission had occasion to examine the rate on dressed beef between Chicago and New York, and we held that this rate could hardly be regarded as excessive. *In the Matter of Proposed Advances in Freight Rates*, 9 I. C. C. Rep. 382. The rate was 45 cents per hundred pounds and
10 I. C. C. REP.

the transportation under very similar conditions to those governing the movement of oranges from California, the traffic being in some respects more desirable and in some less desirable. It will be observed that 45 cents for one thousand miles is nearly equivalent to \$1.25 for 2,700, but it must be further remembered that the level of rates between Chicago and New York is much lower and the actual cost of the service is less than between California and the Missouri River. We very recently held that the peach rate from Georgia to New York was not unreasonably high. *Georgia Peach Growers Association v. Atlantic Coast Line Railroad Co.* 10 I. C. C. Rep. 255. That rate is in round numbers 80 cents for 900 miles with a minimum of 22,500 pounds in cars forty feet in length. The peach is a more delicate fruit, the minimum is somewhat less, the time somewhat faster and refrigeration is always necessary; still after all this has been taken into account, it can hardly be said that \$1.25 for a proper service over 2,700 miles, is excessive for the movement of oranges if 80 cents is not too much for the movement of peaches 900 miles. And here again it must be remembered that the transportation of these peaches is through territory where the general average of rates is less than on these transcontinental roads. If the orange rate be compared with other rates from California to the east or from the east to California it will be found nearly as low, when the nature of the service is taken into account, as the extremely low water-competitive rates at Pacific coast terminals, and generally lower than rates not affected by actual and controlling competition of some kind.

Upon the other hand, I do not regard this rate as a phenomenally low one. The attempt of the Southern Pacific and the Santa Fe to show that this business is handled at a loss is ridiculous, in view of the fact that ten years ago they were both actively soliciting it, and that their connections were, a year before the institution of this proceeding, sending agents two thousand miles to buy it if it could not otherwise be obtained. This rate is, perhaps, somewhat lower to New York than the Florida orange rate to the same point, and it is somewhat higher to Chicago than the Florida rate. All things considered, it seems to me about the fair equivalent of the Georgia peach rate. It

40 I. C. C. REP.

is substantially in line with rates on similar California products. It is a profitable rate to the carrier, and it brings this product freely into the eastern market. It has been in effect for many years. The time may come when it ought to be reduced, but if these defendants were furnishing a proper service I should hesitate to disturb it now.

The service is not, however, anything like what it should be and the reason for this is obvious. Years ago when independent car lines operated in Southern California there was between them the most active competition which led in some cases to an actual reduction in the rate and always to the most zealous attention to the wants and necessities of the shipper. In those days there was competition between the originating roads, the Southern Pacific and the Santa Fe, and the soliciting agents of those two companies were found in every orange grove. Connections east of the Missouri River took pains to ask for this traffic and even to pay for it. To day all this has changed. The exclusive contract has driven every car line but one out of this territory, for the Santa Fe practically owns its own cars. There is no longer competition between originating lines and neither of these companies ever approaches the grower to solicit his business. The denial of the right to route traffic has extinguished competition between eastern connections. The result of all this appears in the service which these shippers obtain or rather in the entire neglect of all their demands for a proper service. I speak entirely of the period covered by the testimony; having no knowledge of present conditions.

In my opinion these competitive conditions cannot be restored by law. I do not believe that they will ever again become effective to improve rates or conditions. If this Commission had the power I would favor prescribing a reasonable service and requiring the railways to perform that service under penalty. I suggested at the taking of the testimony in Los Angeles that some schedule be agreed upon with a fixed rate for that schedule and a reduction in rate when the schedule was not made. The traffic officials of the defendants insisted that this could not be done; certainly this Commission has no power to attempt it. All we can do is to deal with the rate but in so

doing we must consider the service, not as it ought to be, not as the railways say it is to be, but as we actually find it.

Testimony recently taken by this Commission touching the movement of live stock, much of it from carriers who are defendants in this proceeding, tends to show that it costs the carrier 20 per cent more to move express freight upon a schedule of 20 miles an hour than to move dead freight at the rate of 10 miles an hour, and the reasons which they advance in support of that proposition are persuasive. Assuming that \$1.25 would be a reasonable rate for a schedule of from seven to eight days, I think that the service which has been actually rendered in recent years is certainly worth 15 cents per hundred pounds less to the shipper, and probably actually costs the carrier that much less to perform.

The defendants offered various excuses for the character of the service in recent years. It is a sad commentary upon modern railroad operations if with better roadbeds, better motive power, improved methods, it is impossible to make the same time which was made ten years ago. I do not for a moment believe that it has been *impossible* for any considerable period; it may have been inconvenient. It has paid better not to make the time and, therefore, it has not been made. But assuming that the excuses are well founded, and that the carrier has been and will be unable to render a proper service, how can this alter the conclusion? The shipper should not suffer from the misfortune of the carrier. If the carrier is unable to make the same time as formerly, it is because of an accumulation of traffic from which it earns more money, out of which it can well afford to make good the loss which the shipper of this particular traffic suffers in consequence. I agree, therefore, in the proposed reduction.

KNAPP, *Chairman*, dissenting:

I am unable to concur in the conclusions of my associates in this case. In several important particulars the findings in the majority report do not accord with my understanding of the proofs, while the inferences therein drawn are not warranted in my judgment by due consideration of all the facts and circum-

stances entitled to be taken into account. The matters to which I refer are so fully discussed in the separate opinion of Commissioner Prouty that only two or three points seem to me to require further comment.

For example, the finding in respect of rebates, as I read it, substantially implies that the actual rate paid by the shippers averaged something like 8 cents per 100 pounds less than the tariff rate by reason of rebates paid to them; and this is advanced as one of the reasons for condemning the tariff rate as unreasonable. Such a view does not seem to me to be supported by the evidence. The initial carriers, the Santa Fe and the Southern Pacific, perform the greater part of the transportation service and receive the greater part of the rate collected. Any reduction from the present tariff must therefore be largely borne by these two roads. But the testimony of their officers and representatives is positive and emphatic to the effect that neither of them paid any rebates directly or indirectly, or contributed in any way to the rebates received by the shippers; and there is not a syllable of proof to indicate that they were untruthful or mistaken in that regard. More than this, it plainly appears that the complainants herein were the principal recipients and beneficiaries of these illegal payments. This of course, does not preclude them from complaining of the rate in question or operate in any sense as a bar to its reduction, yet to my mind it is a matter of some significance that no complaint appears to have been made by them until they were deprived of these illicit gains. Taking into account all the evidence relating to this aspect of the case, I cannot therein find any ground for holding that the tariff rate should be condemned.

Another reason for the conclusion of the majority appears to be drawn from a comparison of this orange rate with the rates on other articles to and from Pacific Coast terminals. This does not seem to me a fair comparison. There are few important rail rates anywhere more influenced by water competition than are the rates between the eastern seaboard and the Pacific coast. We have several times held that intermediate rates may reasonably and lawfully be higher than through rates on account of the controlling force upon the latter of water competition.

10 I. C. C. REP.

But orange rates are not at all affected by such competition because oranges do not and would not in any case move in important volume by the water routes. Without amplifying the point, it seems to me obvious that no just or informing comparison can be made between the orange rates in question and the extremely low rates on other articles which the rail carriers must accept or abandon the business to the water lines. On the other hand, if comparison be made between the orange rate and the general run of intermediate rates, which, like the orange rate, are not in any considerable degree affected by water competition, it will be found that the orange rate is beyond question relatively low. In other words, the relation of the orange rate to the rates on other traffic, moving between similar points and under similar conditions on these transcontinental lines, is more favorable to the orange shipper than the general relation of such rates in other parts of the country. So far, therefore, as the majority opinion depends on comparison with competitive rates to the Pacific Coast, or other comparison with relative rates elsewhere, it seems to me to have little or no support.

Of more consequence, from my point of view, is the apparent assumption of the majority report that the rate in question was a reasonable rate for the carriers when it was first established. Therefore, the argument runs, this rate should now be considered excessive because of the remarkable increase in the volume of orange shipments and the largely augmented revenues of the carriers from that traffic. But this view ignores undisputed testimony to a contrary effect and seems to me at variance with the circumstances under which the rate was originally fixed and the considerations which then determined its amount. It was doubtless good policy for the carriers to encourage the orange business by the rate accorded and thereby make practically the whole territory of the United States accessible to the California growers. However this may be, the proofs are convincing that this rate at the time it was fixed was materially lower than the carriers were under any legal obligation to apply. If the original rate had been considerably greater, I do not know of any sustainable ground upon which it could have been assailed. So far as I can judge this rate might have been materially ad-

10 I. C. C. REP.—40.

vanced, if the business had continued to be of moderate dimensions, without exceeding the standard of reasonableness which the carriers were bound to observe. Taking this into account, as the facts and circumstances seem to me to require, I am unable to find or conclude that the rate is now too high because it has never been reduced, although the traffic has grown to great and perhaps unexpected proportions.

It is this consideration mainly which prevents me from accepting the conclusion of Commissioner Prouty, whose statement of facts and observations concerning the orange traffic and the conditions under which it is transported express my own views in that regard. It may be quite true, and I am not prepared to dispute it, that the present service is not worth as much to the shippers as the former service by possibly 15 cents per 100 pounds. If, therefore, this rate was only reasonable in a legal sense when the service was better in point of time and other respects, it might be said that the same rate is now unreasonable in view of the slower and less satisfactory service which to a greater or less extent the shipper has lately received. Admitting this diminished value of the service now afforded, I am unable to agree to his conclusion for the reason that the rate in question, even when quicker and better service appears to have been furnished, was in my judgment somewhat lower than the carriers might have lawfully exacted.

Moreover, any failure to maintain the former speed of trains carrying this orange traffic is not, like the rate, a matter of policy and intention. The carriers have not announced their purpose to give slower service or otherwise lessen the facilities heretofore provided. On the contrary, they seek to excuse the detentions that have recently occurred by reference to the remarkable increase in the last few years of all their traffic, including oranges, and their inability at times to handle it without congestion and delays. They assert that present conditions in this regard are only temporary and that they intend in the future to furnish the orange grower with a service as prompt and satisfactory as was formerly afforded. It is a matter of common knowledge that carriers in all parts of the country have not been able to move the extraordinary tonnage offered with customary

dispatch, and there is little reason to believe that orange shippers have suffered more on this account than shippers of other commodities. If these delays in delivery, often, if not altogether, unavoidable, are a sufficient ground for reducing the rate in question, why should not rates in general be condemned for the same reason? In addition to this is the practical difficulty of adjusting rates to the varying conditions of carriage in respect of time and other incidents. Granting all that is claimed as to the recent inferior service afforded to orange shippers, it still remains unproved, in my judgment, that the rate imposed upon this traffic violates any provision of law.

There is another and more general reason for my disagreement. Even if the specific findings in the majority report be accepted as a fair and adequate summary of the facts and circumstances to be considered, I am nevertheless constrained to hold that the unreasonableness of this rate has not been established. The conclusions drawn by them do not seem to me to be warranted even by their views of the testimony as reflected in the findings they have made. The inferences drawn from particular facts, each one of which may be undisputed, are after all matters of opinion which in the nature of the case cannot rest upon a well defined and logical basis of reasoning. Reluctant as I am to differ with those for whose judgment I have the greatest respect, I cannot in this case concur in the conclusions they have reached. All I need say or care to say further in that regard is that the most careful attention I have been able to give to the question leads me to a different conclusion.

In view of the exceptional degree of prosperity which the orange growers of California enjoyed until their production exceeded the consuming capacity of the country, in view of the fact that the rate applied enables them now to reach the most distant markets in the eastern states, to the virtual exclusion everywhere of the foreign-grown orange, and even to the exclusion of the Florida orange except for limited periods of the year, in view of the showing made by comparison of this orange rate with other rates upon which the principal products of the country are to-day moving, in view of all the facts and circumstances which surround the transportation of California oranges, it

10 I. C. C. REP.

seems to me that something should appear much more persuasive and convincing than I am able to discover in this case before we can fairly find as a matter of fact or justly hold as a conclusion of law that the rate in question exceeds the requirement of reasonableness which the regulating statute imposes. In my judgment this rate has not been shown unreasonable, and for that reason I feel compelled to dissent.

10 I. C. C. REP

No. 684.

RICHMOND ELEVATOR COMPANY
v.
PERE MARQUETTE RAILROAD COMPANY.

Decided February 18, 1905.

1. While the Act to regulate commerce contains no provision which expressly or by proper implication gives this Commission jurisdiction in cases merely showing delay or negligence in the receipt, forwarding or delivery of property offered for transportation, including the furnishing of cars, the regulating statute does prohibit any unjust discrimination or wrongful prejudice in the provision of cars or other transportation facilities, as well as in the fixing and application of transportation charges.
2. Every shipper is legally entitled to fair opportunity and treatment in the use of these public utilities, and any discrimination which in substantial degree deprives shippers of such use must be considered unjust, unless forced by justifying conditions. In such a case the burden of proof is upon the complainant to the extent of showing discrimination, and then upon the carrier to show that the discrimination was justified.
3. Merely putting in evidence defendant's rule of car apportionment is insufficient to show discrimination against the complainant; the actual effect of the rule, during the time covered by the complaint is necessary to a determination of the question of unfairness in the distribution of cars.
4. It appears generally from the facts in this case that in furnishing cars defendant unjustly discriminated against the complainant, which desired to ship hay from various points in Michigan, but the proof fails to indicate with any degree of certainty the damage caused by the wrongful discrimination and the amount which the complainant is entitled to recover by way of reparation. Complainant granted leave to apply within a limited time for further hearing.

Silas B. Spier for complainant.

Charles McPherson for defendant.

REPORT AND OPINION OF THE COMMISSION.

KNAPP, *Chairman*:

The complainant alleges that on and after October 15, 1902, the defendant unjustly discriminated against it in furnishing cars for interstate shipments of hay and grain from Valley Center, Doyle, Avoca, Croswell and Memphis, points on defendant's railway in Michigan, in violation of section 3 of the Act to regulate commerce. The defendant, in its answer, denies the violation of law charged in the complaint. The material facts are as follows:

FINDINGS OF FACT.

The complainant is a corporation, having its principal office and place of business at Lenox, Michigan. It is engaged in the purchase, shipment and sale of hay and also deals to some extent in grain. It purchases hay at different points in the State of Michigan, including Valley Center, Doyle, Avoca, Croswell and Memphis, and ships it over defendant's line and other lines connecting therewith to markets in the East and South, including New York, Philadelphia, Boston and Baltimore.

The defendant is a common carrier of interstate traffic, operating about 2,000 miles of railway, with the greater portion of its mileage in the lower peninsula of Michigan. The only transportation facilities enjoyed by the localities of Valley Center, Doyle, Avoca, Croswell and Memphis are those furnished by defendant.

During the month of September, 1902, complainant sold in eastern markets about 300 carloads of hay, and between September 30 of that year and the first of the following January it sold 200 carloads more. Complainant's shipments average about 10 tons to the car.

The contentions of complainant may be classified as follows:

(1) During unreasonably long periods of time defendant neglected to furnish cars ordered by complainant. (2) While defendant was so neglecting to furnish cars to complainant it furnished cars to other shippers for shipments of different freight articles, including hay and straw. (3) About three-fourths of

the hay complainant wished to ship was of such a character that the market for it was confined almost entirely to the winter months, but the number of cars furnished to complainant by defendant during those months, compared with the number furnished during the summer months, was very small. (4) Complainant was greatly damaged by defendant's action in the premises.

At Croswell complainant had ready for shipment on December 1, 1902, 89 carloads, and between that date and April 1, 1903, the amount it had ready for shipment had increased to 148 carloads. In consequence of an oversight the number of cars furnished at Croswell during the winter of 1902-1903 was not shown. A bill of particulars filed indicates that complainant intended to file an exhibit containing such information, but the exhibit does not appear in the record.

At Valley Center complainant had ready for shipment on November 1, 1902, 55 carloads, and on April 1, 1903, 64 carloads. Between October 24, 1902, and May 1, 1903, defendant furnished complainant at this point only 18 cars, only one of which was furnished previous to January 17, 1903.

At Avoca complainant had ready for shipment on December 1, 1902, 62 carloads, and on April 1, 1903, 95 carloads. Between October 18, 1902, and May 1, 1903, defendant furnished only 13 cars, and these were all furnished subsequent to January 18, 1903.

At Doyle complainant had ready for shipment on January 15, 1903, 48 carloads. Between that date and May 23, 1903, defendant furnished no cars at all.

At Memphis complainant had ready for shipment on December 1, 1902, 66 carloads. Between that date and May 1, 1903, defendant furnished only 11 cars, the first of which was furnished on January 7, 1903.

At Valley Center between January 1 and March 23, 1904, complainant had ready for shipment 23 carloads, but was able to obtain only 8 cars.

At Avoca complainant had ready for shipment in October, 1903, 51 carloads, and on March 23, 1904, 85 carloads. Between October 8, 1903, and March 23, 1904, defendant fur-

nished complainant at this point only 5 cars: 1 in January, 3 in February, and 1 in March.

At Doyle complainant had ready for shipment on September 15, 1903, 15 carloads, but between that time and March 23, 1904, was able to obtain only 3 cars.

At Memphis between January 1 and March 23, 1904, complainant had ready for shipment 60 carloads, but was able to obtain only 13 cars.

During all the times mentioned above, in addition to the hay complainant had ready for shipment, there was a large amount of hay it could and would have purchased if it had been able to obtain cars in which to make shipments. Also, in some instances, complainant made contracts for hay which it was afterwards obliged to relinquish on account of being unable to procure cars, and thus lost profits it would have obtained otherwise, because, meanwhile, hay had advanced in price in markets of consumption.

According to the record there was hay awaiting purchasers as follows: At Valley Center on December 21, 1903, about 300 carloads; at Avoca on the same date, hundreds of tons; at Memphis on March 23, 1904, 200 carloads that the owners had, during three months next previous to that date, been urging complainant to buy; in the vicinity of Valley Center, at the latter date, about 150 carloads; and at Avoca, on said March 23, 350 carloads.

Three-fourths or more of the hay complainant wished to ship was what is called feeding hay, and the demand for this is confined very largely to the winter months, after cattle are taken from and before they are returned to the pastures. The price of such hay is therefore ordinarily higher in winter than in summer, and this was especially true during the winter of 1902-1903, compared with the summer of 1903.

During the times aforesaid complainant, verbally, by way of correspondence and through its agents, repeatedly requested defendant to furnish cars for such shipments of hay, and defendant states, by way of excuse for not having done so, that cars were very scarce, and that from time to time its connections re-

refused to accept shipments of hay for delivery at points in the East and South.

During the winter of 1902-1903 defendant did not have at its disposal a sufficient number of cars to meet all requirements of shippers, and, although it endeavored to do so, was unable to obtain from its connections cars enough to make up the deficiency. Also, because of the large tonnage of freight articles defendant's connections were unable to handle that winter all the traffic offered. Therefore, from time to time they placed embargoes upon shipments consigned to certain points in the East and South, and for this reason more or less restriction existed concerning the markets to which shipments could be made. The record shows that at different times between October 22, 1902, and June 29, 1903, because of congestion, embargoes were put upon shipments of hay to New York, N. Y.; Philadelphia, Alleghany and Pittsburg, Pa.; Baltimore, Md., and many other points in the East and South. Also, between October 24 and November 21, 1902, the Wabash Company refused to accept shipments of hay consigned to Chicago, and on April 7, 1903, the Hocking Valley and the Cleveland, Cincinnati, Chicago & St. Louis companies placed embargoes upon such shipments consigned to Cincinnati.

To what extent defendant's failure to furnish cars to complainant was caused by these embargoes it is impossible to say definitely, but the following tables, which show, for the time between November 1, 1902, and January 1, 1904, all shipments from points on defendant's road and comparison therewith of cars furnished complainant; also, shipments of hay and straw, with a similar comparison, will throw some light upon the subject.

10 I. C. C. REP.

INTERSTATE COMMERCE REPORTS.

	All shipments. Carloads.	Cars furnished complainant.	Percentage furnished complainant.
1902.			
November,	26,655	11	.04
December,	26,821	0	.00
1903.			
January,	24,905	12	.05
February,	23,522	15	.06
March,	26,056	19	.07
April,	26,316	17	.06
May,	26,247	91	.35
June,	25,251	144	.57
July,	22,891	156	.68
August,	24,527	31	.13
September,	28,639	50	.17
October,	30,516	17	.06
November,	27,067	11	.04
December,	25,192	16	.06

	Hay & Straw shipments. Carloads.	Cars furnished complainant.	Percentage furnished complainant.
1902.			
November,	736	11	1.5
December,	938	0	.0
1903.			
January,	1,745	12	.7
February,	1,175	15	1.3
March,	1,184	19	1.6
April,	2,384	17	.7
May,	2,657	91	3.4
June,	2,222	144	6.5
July,	1,370	156	11.4
August,	701	31	4.4
September,	1,926	50	2.6
October,	1,203	17	1.4
November,	781	11	1.4
December,	1,432	16	1.1

Although, because of the character of its hay, complainant required more cars in winter than in summer, the above tables show that of the 590 cars furnished it by defendant 472 were furnished between May 1 and November 1, 1903. While no great variation appears between different months in shipments

10 I. C. C. REP.

from all points, during the 14 months mentioned, the percentage of cars furnished to complainant was much less in winter than in summer; and a like result is obtained by comparing the total number of cars furnished for shipments of hay and straw with those furnished to complainant. Defendant's car service agent said he could not specify cases where complainant's inability to obtain cars was caused by the embargoes, although he thought such cases existed, but he also said he didn't think the embargoes made it any more difficult for defendant to furnish cars to complainant than to furnish them to other shippers of hay in the same section.

Complainant also contended that discrimination against it resulted from the manner in which defendant distributed cars for shipments of hay, to the various shippers at Valley Center, Doyle, Avoca, Croswell and Memphis. It stated that defendant paid no attention to the number of carloads each shipper had ready for shipment or to the length of time cars had been ordered, except that it furnished the first car on the oldest order, the second on the next oldest, and so on. This was corroborated by defendant's car service agent, who said: "If both shippers were ready to ship the quantity on hand would cut no figure, as long as cars were scarce." The agent also stated that the fact that one man's order was older than that of another man would make no difference, except that the first car available would be furnished on the former order, while the next car available would be furnished on the latter order.

Because it could not obtain cars complainant was not able to ship until July and August, 1903, a large portion of the hay it had ready for shipment during the winter of 1902-1903, and the prices of hay in consuming markets during those two months compared with the early portion of the year 1903 ranged from \$2 to \$4 per ton lower.

After complainant made purchases and sales in the fall of 1902 hay advanced materially in price, and in order to fill contracts it had made in the East at the lower prices during the latter portion of 1902 it was obliged to make purchases at the higher prices at points other than those here in question and where it could obtain cars in which to make shipments. It was

10 I. C. C. REP.

also compelled to have hauled by teams from Doyle to Lenox, Mich., a distance of about ten miles, 15 carloads of hay at an expense of 75 cents per ton, and pay rent for places in which to store its hay while it was waiting for cars. In some instances, because it thought the hay would not remain there long, complainant put it into barns that were not tightly boarded, in consequence of which it was damaged by exposure to the elements. It was also damaged to some extent by rats. About 4 tons of the hay at Doyle and 3 tons of the hay at Memphis were thus rendered entirely worthless, and 10 or 12 cars more of the Doyle hay sold at a heavy loss on account of its damaged condition.

Although complainant in its petition alleged discrimination by defendant in furnishing cars for both hay and grain, the evidence adduced and the statements herein made, so far as cars furnished to complainant are concerned, apply only to shipments of hay.

CONCLUSIONS.

The Act to regulate commerce contains no provision which expressly or by proper implication gives this Commission jurisdiction in cases merely showing delay or negligence in the receipt, forwarding or delivery of property offered for transportation, and this necessarily includes failure on the part of the carrier to furnish cars for the movement of freight within a reasonable time. The regulating statute does, however, prohibit any unjust discrimination or wrongful prejudice in the provision of cars or other transportation facilities, as well as in the fixing and application of transportation charges. This prohibition is found in the third section, which forbids in general terms undue or unreasonable preference or prejudice, advantage or disadvantage, for or against persons, localities, or particular kinds of traffic, in any respect whatsoever. Every shipper is legally entitled to fair opportunity and treatment in the use of these public utilities, and any discrimination which in substantial degree deprives shippers of such use must be considered unjust, unless forced by justifying conditions. The burden of proof is upon the complainant to the extent of showing discrim-

ination, and then upon the carrier to show that the discrimination was justified.

Under such statement of the law, we must first inquire in this case whether complainant has submitted proofs which amount to a showing of discrimination by defendant in the provision of cars for its shipments and those of other shippers by defendant's line.

The defendant's rule of car apportionment is that regardless of the number of carloads shippers may have ready for shipment, the first car goes to the shipper who placed the first order, the second to the second order, and so on until each day's supply is exhausted. The mere showing of such a rule and claim that it works discrimination is insufficient. The actual effect of the rule during the time covered by the complaint is necessary to a determination of the question of unfairness in the distribution of cars. The rule of apportioning cars in times of great scarcity by giving the first car to the first shipper ordering and the second to the next shipper ordering, may be entirely just. On the other hand, with a considerable, but still scarce, car supply, and a shipper, like complainant, having a large quantity to ship, while others may have but an occasional carload, rigid adherence to such a rule might prove decidedly unjust.

At Valley Center complainant had ready 55 carloads of hay on November 1, 1902, but only received one car prior to January 17, 1903. At Avoca, with 62 carloads for shipment on December 1, 1902, complainant failed to obtain any cars until after January 18, 1903. At Doyle, with 48 cars ready January 15, 1903, complainant was not furnished with a single car between that date and May 23, a period of four months. At Memphis, complainant had 66 carloads for shipment December 1, 1902, but it received no car at this point until January 7, 1903. The defendant's carload traffic in hay and straw from all points, notwithstanding embargoes from time to time to certain destinations by connecting lines, was large throughout the periods covered in these statements. During the entire month of December, 1902, though defendant's total carload traffic amounted to 26,821 cars, and its hay and straw carload traffic amounted to 938 cars, it failed to furnish complainant with a

10 I. C. C. REP.

single car for hay at any of the several points of shipment mentioned. We need not make further comparison, or restatement of other omissions to furnish cars to complainant, which are specifically set forth in the findings. The instances here noted are those in which complainant was subjected to the greatest hardship.

The findings taken as a whole indicate that complainant has been subjected to substantial discrimination, but this conclusion is based upon general consideration of the facts and not upon any circumstances showing the extent of such discrimination. The testimony taken in behalf of the defendant does not show justification for the discrimination to which complainant has been subjected. We have, therefore, a case of unjust discrimination in furnishing cars appearing generally from the facts, and the important further question arises whether upon the record as made in this case any relief can be afforded to complainant. Discriminations in the furnishing of cars are rarely continuing offenses which can be discontinued for the future under a regulating order couched in general terms and directing the carrier to cease and desist therefrom, and this case constitutes no exception to that rule. Therefore, in this class of cases the remedy generally must be found in an order awarding reparation for the injury found to have been done. The statute expressly provides for such an order by the Commission, but it must be evident that no order of that kind can be issued in the absence of proof indicating, with some degree of certainty, the damage caused by the wrongful discrimination and the amount which the complainant is entitled to recover by way of reparation. In this case the testimony is altogether too meagre to warrant a finding in that respect. No competitor of complainant is shown to have been preferred in the distribution of cars at the places mentioned in the complaint during the periods in which the complainant was able to obtain only a few or no cars for its shipments of hay; and there is no testimony showing directly that during such periods any of complainant's points of shipment were arbitrarily left unsupplied with cars for the traffic while other specified points were given an advantage. It would have been easy to obtain this proof, if it exists, either

from sources within the general business knowledge of complainant's officers, or by taking the testimony of defendant's agents at various stations, or the official having the apportionment of cars in charge, in connection with required submission by subpoena or otherwise of defendant's records of car distribution. In the same way the daily shortage of cars for hay and other kinds of traffic could have been ascertained, and this, compared with the shipments actually carried, would have thrown some further light upon the case.

The complainant, represented by a competent attorney, is in the position of having refrained from offering necessary testimony, which it could have obtained through its own efforts or by the process of the Commission. This attitude of complainant is perhaps explained by a statement of its counsel to the effect that complainant would go into the question of damages only for the purpose of showing that the discrimination alleged was serious, and that it might wish to present the matter of reparation in the first instance to the Federal court. We express no opinion upon the course of action followed by the complainant in this respect.

Upon the considerations above stated, we must decide that while complainant has been subjected to unjust discrimination in the matter of car supply, the record furnishes no basis for the entry of an order requiring reparation by the defendant carrier.

The complainant will have leave, if it so desires, to apply to the Commission on or before April 1, 1905, for a further hearing at which to submit testimony intended to show specific damages occasioned by the discrimination complained of, as the basis for an order awarding reparation, the defendant to have notice of such hearing and the right to submit rebuttal testimony. If such application is not made within the time allowed, the complaint will be dismissed.

10 I. C. C. REP.

No. 658.

CHARLES A. THOMPSON

v.

THE PENNSYLVANIA RAILROAD COMPANY.

Decided March 10, 1905.

1. The right of complainant to ship coal was not barred by the fact that he is a druggist by occupation, or that he loaded coal cars from wagons, for a large part of the commerce of the country is handled in that way; and when he tendered freight for transportation he was entitled to the same facilities furnished to other shippers under like conditions.
2. During the anthracite coal strike of 1902, which caused an extremely large demand for bituminous coal and great increase in the price of that coal, complainant arranged for the purchase and sale of the surplus product of certain bituminous mines, called surface or country mines, and for hauling the coal by wagon to stations or sidings and loading upon defendant's cars. Under normal conditions this could not be done at a profit. Complainant demanded and received several cars during the month of November, 1902. In that month defendant issued a rule limiting its coal cars to mines having track connection with its road, and this rule was kept in force during the strike period. The demand for coal throughout the strike resulted in the greatest tax upon the railroad equipment and in the congestion of lines, yards and terminals. The mines loading by tippie and by track connection received far less than their usual car supply. Under those and other attendant conditions, defendant's temporary rule, confining its comparatively few available cars to mines generally in operation, where quick loading could be accomplished, and declining to permit its sidings or switches to be further congested by loading coal from wagons, not only by complainant, but many others temporarily engaged in the same pursuit, was calculated to hasten rather than retard the movement of coal for public use, and was not unreasonable or unjust.
3. No opinion is expressed upon the point whether a railroad may, under ordinary conditions, discriminate in furnishing cars as between the methods of loading by tippie and wagon, or whether without a rule

10 I. C. C. REP.

it may, even in great emergency, discriminate between the two classes of shipments, and the decision is confined to the particular situation disclosed by the record in this proceeding.

John B. Daish, Walter Lyon and W. A. Griffith, of Lyon, McKee and Mitchell for complainant.

Thomas Patterson and Francis I. Gowen, for defendant.

REPORT AND OPINION OF THE COMMISSION.

CLEMENTS, *Commissioner*:

The petition sets forth that the complainant is shipper of coal from Irwin, Jeannette and Marchand, in the State of Pennsylvania, to various markets in other States; that the defendant is a common carrier subject to the Act to regulate commerce; that in the fall of 1902 the complainant notified defendant to furnish cars for such shipments, which defendant failed and neglected to do under a rule to furnish no cars to be loaded from wagons, though furnishing cars to competitors at the same time.

Complainant avers that he can load cars as promptly as can be done from tipples at sidings without interfering with defendant's traffic; that by reason of said failure to furnish cars to complainant and preferences and discriminations in favor of competing shippers complainant was subjected to damage through loss of profits and injured business, and this through unreasonable prejudice and disadvantage in violation of sections 2 and 3 of said Act, and prays an order that the defendant be required to desist from such violations of the Act, and for reparation for the damage done.

The defendant, answering, alleges complainant is not a regular shipper of coal, but is a druggist; that the shipments made and contemplated were very few in number; admits that it is a common carrier "subject to the valid and constitutional provisions of the Act"; that demands were made for cars which were sometimes complied with. It avers that during the fall of 1902, owing to the anthracite strike and activity in coal-using industries, demand for bituminous coal became so great this 10 I. C. C. REP.—41.

defendant and other companies found it impossible to furnish cars to meet requirements; coal advanced to a high figure and complainant with others at various points purchased rights from farmers to dig surface coal, hauled it to some siding and loaded it by hand into cars; some cars were so furnished, but realizing injury would follow increase of such demand, defendant discontinued the practice and refused to furnish cars to be loaded in this way, but denies discrimination or unreasonable prejudice or that it furnished competitors of complainant, similarly situated, cars to any greater extent than to complainant. It admits that it made a rule that no cars can be furnished for coal from wagons, but insists that this is reasonable, since cars are longer detained by wagons than tipples, and sidings so occupied not designed for such use means increased shifting and delays.

FACTS.

From the records and testimony the following facts bearing upon the issues are found:

During the fall and winter of 1902 and 1903 the strike in the anthracite coal region of Pennsylvania created an unprecedented demand for bituminous coal in Eastern markets, and abnormally high prices prevailed.

These conditions led the complainant, a druggist at Irwin, Pa., to attempt the purchase and sale of the product of what were known as surface or farm or country mines, situated usually a mile or more from the line of the railroad and not operated on account of comparative disadvantages, except for possible local demand.

To this end he engaged to purchase from the owners, the surplus product above each local demand as certain mines might be capable of producing near the stations of Irwin, Jeannette, Marchand and Johnstown.

He also arranged with farmers in the neighborhood of these mines whose teams were idle in the winter months to haul such coal as might be disposed of from the mines to the railroad and load it on cars to be furnished by himself as occasion demanded.

He then made demand on the agent of the defendant to sup-

10 I. C. C. REP.

ply at the respective stations the necessary cars for such shipments to be loaded on sidings from wagons.

Under normal conditions this method of supplying coal from distant mines for shipment afforded no profits; the mines were not operated for railroad shipments, and there was no rule of the company governing the furnishing of cars for that purpose.

The first agent of defendant company approached by complainant announced that cars would be supplied, but the following day the agent at another point said he had an order to place no cars for loading from wagons, and on the same day the first agent said he was in receipt of the same order.

Complainant made many demands on various agents of the company and was furnished several cars in the month of November, 1902, although in that month the following order was issued by defendant forbidding the furnishing of cars for coal except to shippers owning their own sidings and tipples:

"November 17, 1902.

"Our attention has been called to the fact that bituminous coal is being loaded at various points which is hauled in wagons from mines which have no track connection with us. We do not feel that we are under any obligations to furnish cars for this business, particularly in view of the fact that we are unable to supply our legitimate shippers having track connections with our road; and I will be glad if you will instruct your superintendents to place such cars as we have available for the shipment of coal only at mines having track connections with us."

Later, on December 30, an order modifying this rule was published, but instructing the agent "if it is ascertained that this coal is being bought by speculators for the purpose of shipping to tidewater or other Eastern points, such shipments should not be allowed to interfere with the car supply of our legitimate shippers."

In that time some cars had been furnished at various stations for loading with wagons, the Badic Brick Company, under a special order, being permitted to load with coal on its own sidings cars it had emptied of stone, which coal was to be sent to its own quarries.

It has long been the practice of the defendant company to
10 I. C. C. REP.

furnish for the various divisions of its line printed elaborate folio tables in blank for returns, showing each mine worked upon the division by name, the daily capacity of each mine in cars, the percentage of cars available for distribution to which each mine was entitled. Private cars and company cars were not included in these tables of distribution, nor were any farm mines listed, as prior to this period none could be profitably worked.

When an operator desired to open a mine along the line of the railroad he made application on blanks provided for the purpose for the building of a siding, erecting a tippie which might, like a dwelling house, range among the thousands as to price, and applied for cars to be furnished, the proportion he was to receive being determined by the officials of the road after tests, as to capacity and scales, apparently satisfactory to both the road and the operators; and thereafter was listed among the operated mines as entitled to a certain percentage in the daily distribution of empties for shipment.

Wagons could haul about $37\frac{1}{2}$ bushels to the load—one and one third long tons. One witness said a 60,000 lb. car would require about eight or ten wagon loads to fill, but the statement must have been careless because the testimony of the complainant would indicate it required in the neighborhood of double that number of wagon loads for each car of 60,000 lbs. capacity.

The haul from the country mines was one and a half miles or more, and at one point the testimony was that a car could be loaded in one and a half hours or a half dozen cars loaded in a day.

From October to February there were ordered by the various mines, including cars required by defendant company for coal intended for its use, an average of above 3,000 cars per day, and a shortage reported of an average of above 2,000 cars per day; that is, not much above one-third of the cars ordered by the mines regularly in operation along the line of the road were furnished in that period, and there was a shortage as well in the cars ordered for coal for the use of the company.

In November the complainant received five cars, two about
10 I. C. C. REP.

the 12th, and one each on the 18th, 24th and 25th. In January he received one each about the 10th, 19th and 28th. One of these cars, consigned to South Amboy, was held after loading and complainant notified of an embargo on South Amboy whereupon he shipped it to New Trenton, N. J.

Complainant erected at Irwin a platform at a cost of about \$75 to facilitate the loading of cars from which he shipped about one hundred tons and about 88 tons still remained on the platform at the date of the hearing.

The claim for reparation is based on the estimated output of the various country mines named. On this subject he accepted the statements of the owners of the farms. The miners necessary to such production were never engaged, the coal was not mined, the teams were not engaged for the delivery of the capacity claimed, as this would have been idle without the cars to make the shipments; nor was complainant liable on any contracts beyond the amounts for coal actually delivered.

CONCLUSIONS.

The relations of the railroad to the public are well defined by legislation and a long line of judicial opinions, and these entail upon carriers fair and equal treatment to all patrons, both as to rates and facilities. The power of the carrier by favoritism to upbuild an industry or individual, or to destroy another by unlawful discrimination, is too deadly to permit its unbridled exercise, and license in this regard is being constantly curtailed.

That the complainant is a druggist, instead of a so-called legitimate operator, does not in the least abridge his right to enter the field of competition with those who possibly followed some other calling before they were coal operators. That he unloaded cars from wagons is not of itself a bar to his right to ship, else would a great bulk of our commerce suffer eclipse, since much of it is hauled in that way.

It is true the complainant was entirely within his rights in engaging in the business of coal brokerage, and when tendering freight for transportation was entitled to be furnished the same facilities as other shippers under like conditions.

This Commission and the courts have recognized the right of the carriers to establish reasonable rules and regulations; but when so made they are to be enforced in such manner as to do no injustice—with such impartiality as to carry no unjust discriminations against individuals, localities or traffic.

One important element, which entirely revolutionized the normal circumstances and conditions of the local coal traffic, enters into this case. The great anthracite coal strike, with its resulting extraordinary demand for bituminous coal, brought about the almost unprecedented prices for this other fuel, that made profits possible on the working of mines far removed from the railway line, and it was this temporary condition which tempted the complainant and others to embark in the enterprise of exploiting these mines, handicapped as they are under normal trade conditions by the superior and more economical methods of loading with tipples on sidings along the roadway.

But the demand for coal, which raised its price, at the same time created such a demand for cars as to cripple the railroad lines in the East, and brought about such a congestion of freight as almost to paralyze transportation. Everywhere coal lines and yards were crowded with cars; motive power was inadequate, and car shortage increased. Under these conditions the great railway systems penetrating the Eastern bituminous coal fields found it necessary to publish notices laying an embargo on the receiving and transporting of many kinds of freight to many points, which resulted in embarrassment and expense to shippers and receivers of the forbidden traffic, but which action was approved by the public and the authorities as warranted by extraordinary conditions, that demanded heroic measures to avoid congestion of freight, hasten the handling of the coal, and relieve the great distress of the public that grew out of the lack of domestic and manufacturing fuel.

The extraordinary high price of coal was brought about in part by the inability of the bituminous carrying lines to furnish and haul cars for its transportation. One of the reasons inducing complainant to undertake the handling of coal from country mines not otherwise profitable, was the very fact that the

railroad was unable to furnish any of its patrons with the number of cars demanded. It does not appear that the operated mines along its line were given much above one-third of the cars ordered, nor within from 25 to 50 per cent of their capacity of production. The road was threatened with litigation by the operators already suffering from shortage, if the demands of individual shippers were supplied, which it was said "would have crowded out all other freight."

Some rule controlling the distribution of cars available was a necessity. The tipples could load a car in from 2 to 15 minutes on their own sidings, sometimes in train loads, dropped by gravity into position and by gravity out on the line, under such favorable conditions by reason of the expensive facilities, as to lead one of the officials to declare that it favored the movement of coal by 50 per cent over wagon loading cars, which required to be placed on sidings and drilled into trains.

We are not called upon to decide whether railroads may, in the ordinary course of their dealings with shippers, discriminate between tipple and wagon loading cars, as in the Harp Case (118 Fed. 169); or whether, without a rule, they may in an emergency like that of the great coal strike and subsequent car famine discriminate between competing individuals under like conditions by furnishing some and denying others, as in the Glade Coal Company Case recently decided by the Commission (10 I. C. C. Rep. 226). But this point is clear, that under such conditions as prevailed during the period under consideration, with the public clamoring for fuel, with a supply of cars far below the demands from constant patrons, with a freight congestion that taxed the motive power to its limit, the defendant was justified in establishing a rule for that emergency which, justly enforced, was calculated to hasten the movement of this great staple and relieve the distress of a burdened public.

Under these conditions we do not feel justified in condemning a rule to continue to supply the mines in operation with such cars—all too few—as were available for distribution, moved thereto, not by the embarrassment of furnishing a car to the complainant whose facilities seem to have been better than
10 I. C. C. REP.

the average, but by the threatened flood of demands from individuals along the line less favorably equipped that would take up its whole supply of cars, fill the sidings, and reduce the amount of coal handled.

The evidence showed that cars to the extent of 50 or 80 per cent of the capacity of the mines were distributed in the period under consideration, and this included individual or company owned cars, foreign cars and cars belonging to the railroad company. No record was kept of individual demands for cars, though the trainmaster testified that if all wagon shippers had been given all demanded it would have crowded out all other freight—even warehouse sidings—and would have diminished shipments east.

Some regulations regarding the distribution of cars were imperative. The mines in operation along the line of the road were embarrassed by the unavoidable shortage and were loud in their protests and threats of suits against an aggravation of that shortage by the transfer of their agreed percentage for the wagon loading of coal to be hauled from a mile and a half to three miles, with a possible result of closing their own mines. The defendant was harassed by its inability to furnish cars or relieve the congestion, and in desperation had even declared embargoes against certain localities and traffic.

The complainant introduced testimony to show that his handling of cars would not delay shipments, but this emergency period the defendant company had to take into consideration the delays and dangers and expense of complying not only with complainant's demands but what would be the result of complying with all individual demands. One witness declared his opinion that tipple loading in train loads facilitated the movement of coal 50 per cent and defendant's superintendent said the movement from the tipple mines was "very much quicker."

As to the alleged discriminations in favor of competitive wagon shippers, the evidence does not establish any intentional wrong to complainant by any undue preference for any other individual country mine consignor. Some cars were secured by other wagon shippers as well as complainant, but none seem to have been regularly supplied and the freight trainmaster

testified: "We did our best to comply with the orders." At least some of the cars so used for shipping wagon loaded coal were secured by individuals unloading cars in use, without authority and in some instances shipping them in with small quantities of freight for that purpose.

Under all the circumstances, such a rule as the one under consideration does not seem unreasonable. An emergency had arisen under which the shortage of cars already pressed hard upon established industries. The regulation temporarily adopted seemed best calculated to relieve the situation, to hasten the delivery of coal, and give the best service to the public and the operating mines, both already suffering from the inability of defendant to provide the extraordinary facilities demanded by the abnormal conditions. The complaint must be dismissed.

10 I. C. C. REP.

No. 702.

THE CANNON FALLS FARMERS' ELEVATOR COMPANY

v.

THE CHICAGO GREAT WESTERN RAILWAY COMPANY AND THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Decided March 25, 1905.

1. A ruling that an antecedent haul to one locality and no previous transportation to a competing locality constitute justification for a lower charge from the former to a common market, would be in effect to approve the equalization of natural advantages and disadvantages as between localities, and such equalization is not sanctioned by the Act to regulate commerce.
2. With competition for the carriage of grain to and via Duluth and other northern lake ports, rates of 10 cents on wheat and $7\frac{1}{2}$ cents on other grain from Minneapolis to Chicago are as high as can be obtained by the all-rail lines between those points, and competition by lines other than the defendants from Minneapolis to East St. Louis has fixed the rate by all lines at 10 cents per 100 pounds, and this also controls the rate to Louisville. The rates from Cannon Falls, a point in Minnesota 48 miles from Minneapolis, to Chicago, East St. Louis and Louisville, are also competitive rates, and in its competition with Minneapolis Cannon Falls is entitled to as low rates to common points as the difference in conditions will permit. In view, however, of the desirability of keeping open the Minneapolis market to Cannon Falls grain, the short distance between those points, and the low rate from Minneapolis forced by competition, it is apparently not unjust that the grain rate from Cannon Falls should be as high as the local rate to Minneapolis plus a $7\frac{1}{2}$ cent rate therefrom to Chicago, provided the Cannon Falls dealer is not thereby subjected to disadvantage as compared with the Minneapolis grain dealer.
3. Under present rate conditions the Cannon Falls shipper is subjected to disadvantage as follows:

First: The combination of rates on rye and other coarse grain from Cannon Falls to Minneapolis and Minneapolis to Chicago is $\frac{1}{2}$

10 I. C. C. REP.

cent less than the straight rate from Cannon Falls to Chicago, and this is without justification.

Second: The favorable location of Cannon Falls with reference to Minneapolis and Duluth and the competitive advantage to which the Cannon Falls dealer is entitled by reason of the route via Duluth, are neutralized to an extent by manipulation of billing at Minneapolis whereby Cannon Falls grain sold in Minneapolis can be reconsigned to Duluth under a substituted billing and the balance of a through rate, resulting in a less total charge from Cannon Falls to Duluth than the charge on a through shipment from Cannon Falls to Duluth.

Third: The rate on rye, barley and other coarse grain from Cannon Falls to Louisville or East St. Louis is wrongfully higher than the rate on wheat between the same points.

W. J. Donahower for complainant.

Frank B. Kellogg for defendants.

REPORT AND OPINION OF THE COMMISSION.

KNAPP, Chairman:

This complaint, brought in the name of the Cannon Falls Farmers' Elevator Company, was submitted by the Railroad and Warehouse Commission of Minnesota, which has also undertaken the conduct of the proceeding on behalf of complainant and has been represented upon the hearing and in argument by the Attorney-General of that State. In the complaint unlawful prejudice and disadvantage are alleged to result from the defendants' adjustment of rates on grain from Cannon Falls and Minneapolis, Minn., to Chicago, Ill., and on rye from the same points to Louisville, Ky.; and this is denied by defendants.

The complainant, a corporation, is engaged in the purchase and sale of grain at Cannon Falls, Minn., and the shipment of such grain therefrom to Minneapolis, Chicago, Louisville and other points.

Cannon Falls is on a branch line of each defendant. On the Chicago, Milwaukee & St. Paul the Cannon Falls branch leads from Cannon Junction, near Red Wing, on the River Division, to Northfield, on the Iowa & Minnesota Division. The Iowa & Minnesota Division and the River Division both lead to Minne-
10 I. C. C. REP.

apolis. The distance from Cannon Falls east to Cannon Junction is 17 miles, and from Cannon Junction northwest to Minneapolis 47 miles, making a total distance of 64 miles from Cannon Falls to Minneapolis via the River Division. The distance from Cannon Falls west to Northfield is 15 miles, and from Northfield north to Minneapolis 43 miles, or a total of 58 miles. Traffic from Cannon Falls to Chicago may go via either of the divisions above named, but it is understood that grain shipments usually take the shorter route via the River Division. The distance to Chicago (River Division) is 420 miles from Minneapolis and 390 miles from Cannon Falls.

On the Chicago Great Western, Cannon Falls is intermediate between Red Wing and Randolph. It is 6 miles east of Randolph and 21 miles west of Red Wing. From Randolph the main line runs northerly to Minneapolis 42 miles. This gives a total distance of 48 miles by this line from Cannon Falls to Minneapolis. The distance from Minneapolis to Chicago is 430 miles, and from Cannon Falls to Chicago 394 miles. The mileage from Cannon Falls to Chicago is therefore 4 miles greater, and from Minneapolis 10 miles greater, by the Great Western, while from Cannon Falls to Minneapolis it is 10 miles less. It should also be observed that Cannon Falls is not on any direct or main line between Minneapolis and Chicago, or between Minneapolis and St. Louis, Louisville and other large markets.

The rates per 100 pounds directly involved are: a rate of 15 cents on grain from Cannon Falls to Chicago; a rate of $7\frac{1}{2}$ cents on grain, other than wheat, from Minneapolis to Chicago; a rate of 7 cents on rye, barley and other coarse grain, and a rate of 8 cents on wheat, from Cannon Falls to Minneapolis; a rate of 21 cents on rye from Cannon Falls to Louisville; and a rate of 14 cents on rye from Minneapolis to Louisville. The rate on wheat from Minneapolis to Chicago is 10 cents. The rates mentioned are all per hundred pounds in carload lots.

Besides the $7\frac{1}{2}$ cent rate on grain other than wheat, and the 10 cent rate on wheat from Minneapolis to Chicago, there is a local rate of $12\frac{1}{2}$ cents on all grain between these points, but in practice only the $7\frac{1}{2}$ cent and the 10 cent rates, which

10 I. C. C. REP.

are called proportional rates, are used. On the River Division of the Chicago, Milwaukee & St. Paul the local rate is $12\frac{1}{2}$ cents, the same as from Minneapolis, but from points on its line to Chicago via the Iowa & Minnesota Division, and from points on the direct line of the Chicago Great Western to Chicago, a higher rate of 15 cents to Chicago is charged. Still higher rates are in force to Chicago from points on the lateral lines of each company. This adjustment of rates from Minneapolis and intermediate points on the various lines to Chicago is based principally upon the following conditions: Competition via Duluth and other northern lake ports; that no grain originates at Minneapolis; that grain does originate at Cannon Falls and other shipping points in that section, and that practically none is shipped in to such points for reshipment in the form of grain. The rate into Minneapolis added to the proportional rate out to Chicago is in no case less than the rate to Chicago from any point intermediate between Minneapolis and Chicago. Some exceptions exist as to points near Minneapolis, where the rate to Minneapolis plus the rate of $7\frac{1}{2}$ cents from that point to Chicago gives a total rate from $\frac{1}{2}$ cent to $2\frac{1}{2}$ cents less than the direct rate from the point of origin to Chicago. An instance of this kind is the rate on rye and other grain, except wheat, from Cannon Falls, which by combination on Minneapolis is $\frac{1}{2}$ cent less than the direct rate to Chicago. The 15 cent rate from Cannon Falls to Chicago is claimed by defendants to be a reasonable charge for the transportation, and no direct testimony to the contrary has been submitted.

The proportional rate of $7\frac{1}{2}$ cents from Minneapolis to Chicago is forced by the competition of lines leading to Duluth and other lake ports and the competition of lake lines to Chicago, Buffalo and other eastern points; and even with that low rate in effect on the all-rail lines the bulk of the grain goes via rail to northern lake ports and the lakes to destination. While not distinctly shown in this record, the Commission understands from frequent investigation that the rate to and via Chicago and the lakes to the east, say Buffalo, must meet the rate via Duluth and the lakes; and of course the all-rail lines via Chicago, as well as to Chicago, must adjust their rates with

10 I. C. C. REP.

reference to those in effect by rail and lake. It also results that rates from all points of shipment, including Cannon Falls, to Chicago are affected by the rates to and via Duluth. The Railroad and Warehouse Commission of Minnesota has exercised its authority over the rates from Minnesota points to Minneapolis and Duluth. The result of that action and of the rates fixed by the carriers, by voluntary action or otherwise, on interstate hauls to Chicago, is such that in numerous instances the combined rates from Minnesota points to Minneapolis and from Minneapolis to Chicago are as low as the direct rate to Chicago. The defendant and other railway companies are also interested in maintaining the competition of the Minneapolis market, and it is not intended to find that the result above stated is due entirely to the action of the Minnesota Commission. In some cases, of which the above-cited rate from Cannon Falls is an example, the combination on Minneapolis is less than the direct rate to Chicago.

Much grain is bought at Minneapolis in the winter months and stored for shipment during the season of navigation, and it appears that in all seasons grain is bought and sold in Minneapolis upon the basis of rail and lake transportation charges.

North of a line drawn northwesterly from Minneapolis to or near Breckenridge, Minn., the rates on grain from all producing points to Minneapolis and Duluth are the same. From points south of that line and from points on lines in South Dakota they are lower to Minneapolis than to Duluth. Grain from that region may be shipped to Minneapolis at the local rate and then the same or other grain reshipped from Minneapolis to Duluth at the balance of the through rate. Such balances of through rates appear to range from 2 to 5 cents. In the testimony they are said to average from 3 to 4 cents. The local rate between Minneapolis and Duluth is 7½ cents, but this rate is never used. A proportional rate of 5 cents is applied instead on all grain not shipped on the balance of a through rate. The balance of the through rate from many points equals the 5 cent proportional. From points on the line of the Chicago Great Western in Minnesota it appears from tariffs on file that the through rate in all cases equals the local

to Minneapolis and the 5 cent proportional to Duluth. The defendants are not the only carriers of grain to Minneapolis, and the Chicago Great Western has no line from Minneapolis to Duluth. The Chicago, Milwaukee & St. Paul does, however, participate in this reconsigned grain traffic between Minneapolis and Duluth.

Minneapolis, as the largest milling center in the United States, consumes large quantities of grain. This tends greatly to the accumulation of expense bills, and therefore it is entirely practicable, by substitution of billing, to secure lower through rates on grain reconsigned from that point to Duluth than the established tariff rate on a through shipment from the actual point of origin. In other words, grain from Cannon Falls sold in Minneapolis may, by the use of billing from a more distant point of shipment, be carried from Minneapolis on a 3 cent balance of a through rate instead of the 5 cent proportional applying on Cannon Falls grain from Minneapolis to Duluth, thereby reducing the established charge 2 cents per 100 pounds. For example, a through shipment of rye from Cannon Falls to Duluth takes a rate of 12 cents, based upon 7 cents to Minneapolis and 5 cents from Minneapolis, whereas if Cannon Falls rye is reconsigned at Minneapolis under the balance of a through rate, as above indicated, the total charge from Cannon Falls to Duluth is only 10 cents. To that extent the Cannon Falls shipper is prejudiced and the Minneapolis dealer is favored in reaching eastern markets via Duluth. The Cannon Falls shipper is also deprived of whatever effect a 10 cent rate to Duluth would have, if in force, upon his direct rate from Cannon Falls to Chicago. The same situation results at all points from which grain can be carried to Minneapolis and there reconsigned under substituted billing at a balance of a through rate less than the actual charge on a through shipment from such point to Duluth.

There is no provision in the tariffs of roads to Minneapolis and from that city to Duluth which authorizes the practice of applying the balance of a through rate, and if there were it would apparently be impracticable to prevent the substitution of billing and the resulting application of a low balance of a through rate to grain which would otherwise take the 5 cent 10 I. C. C. REP.

proportional charge. Any grain shipped to Minneapolis and there put upon the market becomes Minneapolis grain, and for reshipment it stands upon the same footing as other grain brought to Minneapolis, including that originating in the Cannon Falls district, from which the rate to Duluth is as high as the local rate to Minneapolis plus the 5 cent proportional to Duluth.

While a large part of the grain carried to Duluth under through rates via Minneapolis and reconsigned therefrom on the balance of a through rate originates in Minnesota, and the transportation to Duluth is therefore wholly within Minnesota, that part which originates beyond the western boundary of Minnesota is interstate traffic.

Market and transportation conditions have frequently been such as to result in prices for grain at Minneapolis which exceeded the prices on the same day in the much more distant Chicago market, and the prices at Chicago, when higher than at Minneapolis, have not for some years been as much higher as the difference in transportation charges to those cities. This tends, of course, to draw quantities of grain to Minneapolis which might otherwise be sent direct to Chicago and eastern destinations.

The district around Cannon Falls is largely devoted to the production of rye and barley, and the complainant is chiefly interested in the rates on those grains. A large part of the rye and barley handled by complainant is shipped to the Louisville market and other grain distilling points in Kentucky and Ohio. The rate on rye and barley from Minneapolis to Louisville is 14 cents, and from Cannon Falls to Louisville 21 cents. The proportion of these rates to the line south of Chicago is 40 per cent of the through rate, provided that the line north shall not have more than its rate to Chicago. The proportion received by the line south of Chicago is $6\frac{1}{2}$ cents on Minneapolis shipments, which leaves to the line north the $7\frac{1}{2}$ cent rate to Chicago. On shipments from Cannon Falls the line south of Chicago receives 9 cents, which is determined by deducting 1 cent for the Louisville Bridge and adding thereto 40 per cent of the remainder. The local rate from Chicago to

10 I. C. C. REP.

Louisville is 11 cents. The rate from Cannon Falls and also from other points in the Cannon Falls district to East St. Louis is 17 cents, which is equal to the combination of the 7 cent rate to Minneapolis and a 10 cent rate in effect from Minneapolis to East St. Louis. The Burlington system and other lines have direct routes from Minneapolis to East St. Louis, and competition has forced a rate between those points only $2\frac{1}{2}$ cents above the rate from Minneapolis to Chicago. From East St. Louis to Louisville the rate on all grain is 4 cents. The rate of 10 cents applies on all grain from Minneapolis to East St. Louis. The 17 cent rate from Cannon Falls to East St. Louis on rye, barley and other coarse grain is 1 cent above the rate on wheat.

A peculiar feature of this whole system of rates is that from Cannon Falls and other points comparatively near Minneapolis the rate to East St. Louis is higher upon rye, barley, corn and oats than it is upon wheat, flour and mill stuff, while on the other hand the rate upon rye and other coarse grain is lower than the rate upon wheat, flour and mill stuff from Cannon Falls and other points in that section to Minneapolis; the rates from Cannon Falls to Chicago and from Minneapolis to East St. Louis are the same upon all grain; and rates generally on rye and other coarse grains are the same as, or lower than, the rates on wheat. While it is true that little wheat is shipped from the Cannon Falls section, that fact is not claimed to justify the disparity, and it is difficult to see why a rate on grain other than wheat higher than the wheat rate should be imposed on Cannon Falls shipments to East St. Louis, unless it is desired to favor the dealer in Minneapolis by equalizing the difference in rate in favor of rye and barley from this section to Minneapolis.

CONCLUSIONS.

This record discloses the existence of highly competitive conditions affecting the transportation of grain to Minneapolis, Duluth and Chicago, and from or through those markets to the east and south. In deciding the case we must give proper effect to those conditions in conformity with the construction of the statute by the United States Supreme Court.

10 I. C. C. REP.—42.

The rate of $7\frac{1}{2}$ cents on rye and other coarse grain from Minneapolis to Chicago and the rate of 14 cents from Minneapolis to Louisville, based upon the rate of 10 cents to East St. Louis and 4 cents therefrom to Louisville, are fixed by competition as described in the findings and appear to be low for the service rendered.

It is true, as claimed by defendants, that Cannon Falls is a primary market neither to nor through which grain is transported by rail previous to shipment therefrom, and that Minneapolis is a secondary market to which all grain shipped from that point has been previously carried by rail at a charge which usually exceeds and is never less than the difference between the established $12\frac{1}{2}$ cent local from Minneapolis to Chicago and the $7\frac{1}{2}$ cent proportional between those cities. We do not think, however, that the difference in rates complained of as between Cannon Falls and Minneapolis to Chicago is justified by the fact that there is an antecedent haul to Minneapolis and no previous transportation to Cannon Falls. To hold otherwise would be in effect to approve the equalization of natural advantages and disadvantages as between localities, and such equalization is not sanctioned by the regulating statute. The really controlling condition, as it seems to us, is that the local rate into Minneapolis plus the $7\frac{1}{2}$ cents to Chicago makes as high a rate as can be obtained under the competition for the same grain to or via Duluth. In other words, the through or total rate via Minneapolis to or through Chicago must bear a definite relation to the rate or total charge via Duluth. The Minneapolis rate of 10 cents to St. Louis (East St. Louis) is also fixed by the competition of lines other than defendants, and this has resulted in making that rate represent an arbitrary of $2\frac{1}{2}$ cents above the rate to Chicago.

With these fixed conditions governing the Minneapolis rates to Chicago and East St. Louis, and the low 4 cent rate from East St. Louis to Louisville, we are led to consider whether the rates from Cannon Falls to Chicago and Louisville are just and reasonable under all the circumstances.

The Cannon Falls rate, like all grain rates from the northwest producing region, is also a competitive rate. Grain from

that point can find a market in Minneapolis, in Duluth, in the east, in Chicago, in St. Louis; and the defendants as competing carriers are interested in providing rates to Chicago from all original grain shipping points on their lines, including Cannon Falls, which are properly adjusted to rates via Minneapolis and Duluth. No effort has been made by complainant to show that the 15 cent rate from Cannon Falls is, separately considered, unreasonable for the transportation to Chicago. But in its competition with Minneapolis for the sale of grain in Chicago and other points Cannon Falls is clearly entitled to as small a difference in rates against it as the difference in conditions will permit. The charges have been so adjusted that the Minneapolis market is able to compete on at least even terms with Duluth and Chicago for all this northwestern grain, and it is doubtless a matter of great importance to grain shippers in that territory, including those at Cannon Falls, that this choice of markets should be preserved; but the rate adjustment by which that end is accomplished should not give the Minneapolis dealer an undue advantage over the Cannon Falls dealer in reaching the final market. Bearing in mind the desirability of keeping open the Minneapolis market, the low rate from Minneapolis forced by competition, and the short distance between Cannon Falls and Minneapolis, it is perhaps not unjust that the rate from Cannon Falls to Chicago should be as high as the local rate to Minneapolis plus the $7\frac{1}{2}$ cent proportional to Chicago, provided the Cannon Falls shipper is not thereby placed at a disadvantage as compared with the grain dealer in Minneapolis. At present the Cannon Falls shipper is subjected to disadvantage in the following respects:

First: The combination of rates, Cannon Falls to Minneapolis and Minneapolis to Chicago, is $\frac{1}{2}$ cent less than the straight rate of 15 cents from Cannon Falls to Chicago. This is admittedly without justification.

Second: Under the practice of reconsigning grain on balances of through rates, Cannon Falls grain sold in Minneapolis can generally, if not always, be reconsigned to Duluth at a balance of a through rate less than the proportional from Minneapolis to Duluth applying on grain shipped direct from Can-

10 I. C. C. REP.

non Falls to Duluth; and this difference may amount to 2 cents or more per 100 pounds.

The facts in this regard indicate that the favorable location of Cannon Falls with reference to Minneapolis and Duluth, and the competitive advantage to which the Cannon Falls dealer is entitled by reason of the route via Duluth, are to the extent stated neutralized by the manipulation of billing at Minneapolis. The remedy for this injustice, and the proper and lawful action to take, is to discontinue the objectionable practice and apply the same fixed rate to all grain reconsigned to Duluth without distinction between points of origin. If that is done the disadvantage here referred to will be removed. *In Re A. T. & S. F. Ry. Co.* 7 I. C. C. Rep. 240.

It seems to us, however, that the application of this remedy is primarily in the hands of the Minnesota Commission, since the greater part of the grain handled on substituted billing is transported wholly within that state and therefore is not subject to our jurisdiction. So far as interstate shipments are involved this Commission will cooperate to the extent of its authority if further action becomes necessary.

Third: The rate on rye and barley and other coarse grain from Cannon Falls to Louisville or East St. Louis is higher than the rate on wheat to those points. No reason was assigned for this unusual adjustment and we think the ordinary relation should be substituted.

If the action is taken which we consider appropriate as above indicated, any resulting change in the rate from Cannon Falls to Chicago may require a corresponding change in the rates to east St. Louis and Louisville, but that of course would be the natural consequence of the readjustment. It is not believed, however, that the changes proposed would have any other effect than to place Cannon Falls and some other points in the vicinity of Minneapolis, upon a basis of relative equality in respect of the rates in question. We express no further opinion as to the manner in which the needful changes should be effected and deem it unnecessary, for the present at least, to enter a mandatory order.

10 I. C. C. REP.

No. 735.

IN THE MATTER OF DIVISIONS OF JOINT RATES
AND OTHER ALLOWANCES TO TERMINAL
RAILROADS.

Decided March 25, 1905.

1. Carriers operating lines to points west of the Mississippi River make rates to such points which are the same from East St. Louis, Ill., as from St. Louis, Mo. A large portion of the less than carload traffic is hauled by team from East St. Louis to the depots of the rail carriers in St. Louis, mostly by regularly organized transfer companies, but to some extent by teams owned by shippers. The rail carriers accept delivery at depots of the transfer companies in East St. Louis, pay the transfer companies 5 cents per 100 pounds for such transfer to St. Louis, and also pay a like sum to the Grant Chemical Company, a shipper, for a similar transfer of that company's shipments from East St. Louis, but refuse to make such payments to other shippers. The Eclipse Transfer Company was organized for the sole purpose of obtaining these payments; it uses teams owned by the Simmons Hardware Company, and uses the storehouse of the latter for a receiving depot. Under the circumstances, *Held*: That the payments to the Grant Chemical Company and the Eclipse Transfer Company are illegal. No opinion is expressed as to whether lines leading west from St. Louis may properly apply the St. Louis rate to the station of a *bona fide* transfer company in East St. Louis and absorb the cost of transfer to St. Louis; nor whether the rail carriers may, by proper schedules, allow all shippers from East St. Louis a fixed sum per 100 pounds for transporting their merchandise to the carriers' depots in St. Louis, those questions not being presented by the record in this proceeding.
 2. The Granite City, Alton & Eastern Railroad Company was organized for the purpose of operating several thousand feet of railway used in the business of the St. Louis Sirup and Preserving Company and located on the latter's private grounds at Granite City, Ill. The
- 10 I. C. C. REP.

Granite City Company has constructed a short track outside the limits of the grounds of the Preserving Company and uses, jointly with other parties, another track about 3,000 feet in length. By means of these tracks the Granite City Company connects with other railroad companies and is paid by the latter certain divisions of transportation charges on traffic shipped by the Preserving Company and hauled to such connections by the Granite City Company. Assuming that the Granite City Company and the Preserving Company are identical in ownership, concerning which a definite finding is not made, *Held*: That the payments to the Granite City Company constitute rebates and are illegal.

3. The Illinois Terminal Railroad Company was organized in the interest of the Illinois Glass Company and uses tracks constructed by the latter on its private grounds at Alton, Ill., for the purpose of connecting its plant with different lines of railway. Facts relating to the construction and operation of the terminal road are stated. *Held*: That if the Glass Company owns and operates the Illinois Terminal Railroad, the case is in all respects identical with the facts developed at the Chicago hearing in this investigation (10 I. C. C. Rep. 385) and the conclusions there announced apply here; but if the holders of the capital stock of the Glass Company own the Railroad Company, a different question may be presented.

J. T. Marchand for the Commission.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, Commissioner:

A further hearing was held in the above entitled general investigation at St. Louis February 20 and 21. Since the facts developed are of public interest it seems proper to make some report of the same. They may be stated under three heads.

1. Rates from the east to St. Louis are higher than to East St. Louis by the bridge toll, which is 2 cents per hundred pounds on carload traffic in most cases and from 5 to 10 cents per hundred on less than carload. There appears to be considerable delay in transferring less than carload business across the Mississippi River for delivery in St. Louis, and for that or some other reason not given a large part of the less than carload traffic from the east which is finally intended for St. Louis is billed to the consignee at East St. Louis, where it is

10 I. C. C. REP.

received and transported by team across the river. What is true of traffic from the east to St. Louis is equally true of that from St. Louis to the east.

Rates from East St. Louis and St. Louis to the west are usually the same. Traffic originating in East St. Louis can be delivered at a railroad depot in that city for the west at exactly the same rate at which it will be received at the railroad depot in St. Louis. One or more lines of railway maintain stations in East St. Louis where they receive such traffic for western shipment, and the Terminal Association with its affiliated companies also maintains a similar depot. When delivered to the last named carrier the freight is transported by it across the river and turned over to the western carrier at St. Louis for carriage to destination. In such case the Terminal Association receives for its service in transporting the freight across the river 5 cents per hundred pounds for less than carload business and 3 cents per hundred for carloads.

Delivery to the Terminal Company as above involves a good deal of delay and is not satisfactory. The practice has grown up, therefore, of hauling by team most of the less than carload traffic from East St. Louis to St. Louis for shipment west.

This large movement by team across the Mississippi River in both directions has led to the establishment of several transfer companies having depots for the receipt and delivery of freight at both St. Louis and East St. Louis. When merchandise from the east is consigned to East St. Louis, the final destination of which is St. Louis, they receive it at the depot in East St. Louis and transport it to the storehouse of the consignee in St. Louis; and conversely freight from St. Louis for eastern destinations is taken by them from the storehouse in St. Louis and transported to the depot in East St. Louis. In both the above transactions the entire expense of drayage is borne by the shipper. Freight intended for western shipment is received by them at their depots in East St. Louis, brought to St. Louis and there delivered to the railroad at its depot. For this service the transfer company is paid by the railway company, the allowance being 5 cents per hundred pounds for less than carload traffic, or the same that would be allowed the Terminal Association.

10 I. C. C. REP.

tion for the performance of the same service. It was said in testimony that the transfer company upon receiving the freight at East St. Louis issued a receipt to the shipper who could upon presentation of the same to the railroad company at St. Louis obtain a bill of lading. The freight seems to be paid in all cases to the railway company, which settles monthly with the transfer company.

The Simmons Hardware Company, which may be selected as a type of what was done in several instances, desiring to use its own teams for the transportation of its freight across the river, applied to the railroads for the same allowance of 5 cents per hundred pounds as was granted to the transfer companies; but the application was refused upon the ground that this allowance could only be made to a transfer company which was party to its published tariff. Thereupon the traffic manager of the Simmons Company organized by incorporation what he called the Eclipse Transfer Company. The capital stock consisted of twenty shares of the par value of \$100 each of which he owned eighteen the other two being held by officers of the Simmons Company. He then proceeded to lease from the Simmons Company the horses and drays used in moving this freight from East St. Louis. It appears that these teams were not used exclusively in that work. The Simmons Hardware Company has stores and storehouses in both St. Louis and East St. Louis and merchandise is frequently moved from one to the other. When these teams are engaged in moving goods from the storehouse in East St. Louis to the storehouse in St. Louis they are employed by the Simmons Hardware Company, but when the same horses and the same drays are engaged in hauling merchandise from the storehouse in East St. Louis to the depot at St. Louis they are under the direction of the Eclipse Transfer Company. The manager of the transfer company stated that his purpose in organizing that company had been to obtain this allowance of 5 cents per hundred pounds.

The tariff of the Missouri, Kansas & Texas Railway Company uses the following language in respect to these transfer companies: "Less than carload rates published in tariffs of this company to and from East St. Louis will apply to and from

depots of all connecting lines and the receiving warehouses of the St. Louis Transfer, Columbia Transfer Company, Leighton Transfer Company, and Eclipse Transfer Company in East St. Louis."

The tariff of the Missouri Pacific Railway Company provides: "The following absorptions will be made out of current published rates to and from St. Louis, Missouri, and East St. Louis, Illinois:

Item No. 1. Cost of transfer between East St. Louis and St. Louis on freight moving between East St. Louis, Illinois, and points west of Mississippi River where rates to and from East St. Louis are the same as to or from St. Louis proper, where such transfer service is performed by bridge or ferry, the tariffs published by those companies to determine the amounts to be absorbed; and when by wagon transfer, the tariffs published by the St. Louis Transfer Co. will determine amounts to be absorbed.

The above contemplates absorption on shipments handled on tracks and at depots in East St. Louis of the various transfer companies only."

While the organization of an independent company seems to have been required in most cases as a condition precedent to the allowance of the drayage charge this rule has not been invariably enforced. It appeared for instance that the Grant Chemical Company, which had no transfer company and which was a party to no published tariff, transported its less than carload traffic from East St. Louis to St. Louis and was allowed the 5 cents for that service. The representative of that company testified that ordinarily the full freight was paid in the first instance either by his company or by the consignee, and that the 5 cents per hundred pounds was subsequently re-paid by the railroad company upon statement rendered; although he seemed to be of the opinion that in some instances that amount might have been deducted from the rate itself when the freight was paid.

2. The St. Louis Sirup and Preserving Company operates an extensive plant at Granite City, Illinois, some few miles north of East St. Louis. Within the limits of its private grounds

10 I. C. C. REP.

are several thousand feet of railway which are used in the business of the company. About a year ago the Granite City, Alton & Eastern Railroad Company was incorporated and that company now maintains and operates these tracks. It has also constructed a short track outside the limits of the Preserving Company and has the joint use of still another track about 3,000 feet in length with certain other parties.

By means of these tracks it forms a physical connection with the Chicago, & Alton, the Chicago, Peoria & St. Louis, and the St. Louis Merchants Terminal railways. The latter railroad connects upon the west side of the Mississippi River with several railroads, among others the St. Louis & San Francisco Railroad. The distance from the limits of the Preserving Company to the point of junction with these different railroads is from a few feet to perhaps 2,000 feet. The Granite City, Alton & Eastern Railroad has one locomotive and a few tank cars.

The one witness examined upon this subject was Mr. Day, the traffic manager of the railroad company. He knew nothing about the details of the organization of that company except that Mr. Winterman was the president of both the Preserving Company and the railroad company. The witness was himself at once the traffic manager of the Preserving Company and the railroad company. His office was that of the Preserving Company, his salary was paid by that company and, so far as he knew, the other employees of the railway company received their compensation from the same source.

His railway company was a party to no joint tariffs and it received nothing on account of business delivered by it to the Chicago & Alton or the Terminal Railway from those companies. He had an arrangement with the Chicago, Peoria & St. Louis Co. by which that company made certain payments to the Granite City Railway, these payments ranging from $\frac{1}{2}$ cent per hundred pounds to $1\frac{1}{2}$ cents per hundred pounds. In another connection the witness stated that the maximum amount paid by the Chicago, Peoria & St. Louis Company was 3 cents per hundred pounds.

The witness further testified that when business for the west or southwest passed over the line of the St. Louis & San

Francisco Railroad the Granite City Railway Company received $4\frac{1}{2}$ cents per hundred pounds. In this case the traffic was delivered to the Terminal Railway with routing directions via the St. Louis & San Francisco. The full amount of the published tariff was paid either by the Preserving Company to the Terminal Railway company or by the consignee at the point of destination. Subsequently a monthly statement was rendered to the St. Louis & San Francisco which thereupon made payment of the $4\frac{1}{2}$ cents per hundred pounds by check. Apparently payment was made by the Chicago, Peoria & St. Louis in the same way.

Witness said that these checks were endorsed by him on account of the Granite City, Alton & Eastern Railway Co. and deposited in the bank to the order of that company. He did not understand that up to the present time any disposition had been made of these sums which were comparatively small, having amounted in all to only some \$900.

3. The Illinois Glass Company has an extensive plant at Alton, Illinois, as well as other plants at various points, principally in the State of Indiana, and is said to be the largest producer of glass bottles in the United States. It was organized in 1873. In 1895 certain persons in its interest organized the Illinois Terminal Railroad Company.

That company was incorporated under the general law of the State of Illinois, the original incorporators being Mr. Smith, the President, Mr. Levis, the Vice-President, and Mr. Ferguson, an employee of the Glass Company, who seems to have originated the idea of the railroad. The capital stock was fixed at \$200,000, which was issued to these three persons in equal proportions and still stands in their names except that possibly a share or two may have been conveyed to some other officer of the Glass Company for the purpose of qualifying that person to act as a director of the railroad company. No money whatever was ever paid for this stock, but the railroad company issued \$200,000 in bonds which, to use the language of Mr. Ferguson, were "placed" by the President of the Glass Company. With the money thus obtained the railroad of the Terminal Company has been constructed and equipped.

In 1895 there were within the private grounds of the Glass Company certain switch tracks, the extent of which did not definitely appear. These tracks seem to have been constructed by the Glass Company for the purpose of affording a connection with various railroads entering the City of Alton, and it would seem that the switching in and out of the Glass Works was done without expense to that company by these connecting railroads. Upon the organization of the Terminal Company these switch tracks were taken possession of and have since been maintained and operated by it. Mr. Ferguson testified that the Terminal Company never paid anything for these tracks but simply took possession of them. In addition to that, the Terminal Company constructed about 6 miles of track from the City of Alton to Hartford, Illinois. From Hartford to Edwardsville, Illinois, a distance of about 8 miles, it leases its track from the Wabash Railroad Company, paying a certain per cent upon an estimated value by way of rental. This gives the Terminal Company a line of railroad extending from Edwardsville to Alton. At Edwardsville it makes connection with the Wabash Railroad and the Cleveland, Cincinnati, Chicago & St. Louis Railway; at Hartford with the Chicago, Peoria & St. Louis Railway, and at Alton with the Cleveland, Cincinnati, Chicago & St. Louis Railway, the Chicago & Alton Railway, and the Alton Bridge Railway, by which it obtains connection upon the west bank of the Mississippi with the Burlington System and the Missouri, Kansas & Texas Railway. Its equipment consists of two passenger cars, 100 coal cars and 6 locomotives.

It apparently does a small passenger business between Edwardsville and Alton, but its principal business is the moving of loaded freight cars from various points in the City of Alton to these different lines of railway with which it connects.

The plant of the Illinois Glass Company and its affiliated box company can only be reached over the rails of the Illinois Terminal Railroad and all traffic in and out of those plants is necessarily handled by the Terminal Company. The rates received for that service vary between wide extremes in different cases. For example, the Illinois Glass Company uses

very large quantities of bituminous coal which is mined at Stanton, about 30 miles from Alton. This coal is received by the Illinois Terminal Company at Edwardsville, the through rate being 25 cents per ton and the Terminal Company receiving 50 per cent as its division. The Glass Company also uses large amounts of sand which comes mainly from Missouri. The rate to Alton is 38 cents per ton, not including the cost of delivery at the plant of the Glass Works, for which the Terminal Company receives a switching charge of \$1.50 per car. Upon most traffic the Terminal Company receives as its compensation a division of the through rate to Alton. Upon lumber for use in its box factory the division is 50 per cent of the rate from St. Louis, if the traffic comes through St. Louis; 25 per cent of the rate from Chicago, if the lumber originates in the Northwest.

The principal commodity shipped out by the Illinois Glass Company is glass bottles, of which the railroad company receives, according to the testimony of its General Manager, from ten to fifteen carloads per day. These bottles move upon some published rate from Alton to destination and the Terminal Company is paid for its service in delivering the car to the transporting carrier a division of that through rate. This division varies with the destination of the shipment, being, according to the testimony in this case, fifteen per cent of the rate to the Missouri River, twenty-five per cent of the Chicago rate and fifteen per cent of the rate to Eastern destinations. These divisions allow the Terminal Company for its service, as appears from actual transactions, from \$8.00 to \$13.00 per car, depending upon the destination and the loading of the car. While, however, these were given by the General Agent of the Terminal Company as its divisions, it would appear that there are in certain cases special divisions which are very much higher than those named. For example, upon a car of glass bottles containing 30,000 pounds, shipped from Alton to Kansas City, the Illinois Terminal Company received as its division \$17.10. The rate to Kansas City is twenty-two cents, and fifteen per cent of this would have amounted to \$9.90—much less than the amount actually allowed that company.

There are in the City of Alton certain tracks upon which are located various industries, a paper mill, flouring mills, wholesale grocery establishments, etc., which were originally constructed upon condition that all railroads entering the City of Alton should be equally entitled to their use for the purpose of access to these various industries. In some manner which does not clearly appear the Illinois Terminal Company has obtained the exclusive right to operate these joint tracks so that at the present time it is the only railroad which makes deliveries to and receives traffic from these industries. The rate paid by the shipper is in all cases the published rate to or from Alton, the Terminal Railroad obtaining its compensation by way of a division of this through rate. The General Manager testified that these divisions were the same in all cases, and our understanding is that the division allowed is the same, other things being equal, whether the traffic originates with the Illinois Glass Company or elsewhere. Upon a carload of flour, for instance, from one of the mills at Alton the Terminal Company would receive fifteen per cent of the rate to the Atlantic seaboard, less the three cents lighterage charge if the shipment were to New York. This would yield to that company from \$10.00 to \$14.00 per car. It would seem that these divisions are applied in most cases to both inward and outward shipments.

The Illinois Terminal Company is also made in certain cases a link in the through line between the east and the west. If, for instance, a carload of bottles is to be shipped from some point in Indiana located on the Big Four Railroad to some point west of the Mississippi River, the shipment would be delivered to the Big Four at the point of origin with routing directions *via* the Illinois Terminal Railroad. The Big Four then transports this car to Edwardsville where it delivers it to the Illinois Terminal Company, which in turn transports it to Alton, making delivery, for example, to the Chicago & Alton as the western line, or to the Alton Bridge Company for delivery to some other western line. For this service the Illinois Terminal Railroad receives twenty per cent of the rate up to the Mississippi River. It will be noticed that the Big Four reaches

Alton over its own iron, and that it forms a physical connection there with the Chicago & Alton and the Alton Bridge Railways. It might, therefore, transport this car to Alton and there make delivery to the western line at substantially the same expense which is involved in the delivery at Edwardsville to the Illinois Terminal; but the Illinois Glass Company as the owner of the traffic insists upon the other route.

It will be seen that the Illinois Terminal Company performs for the Illinois Glass Company at a very low price all those services which are to be paid for by the Glass Company itself. It maintains the tracks within its plant and performs whatever switching service may be needed there for nothing. It transports its coal from Edwardsville to a delivery in the plant for $12\frac{1}{2}$ cents per ton. It switches its carloads of sand for \$1.50 per car. Upon the other hand, when the compensation is to be paid out of the rate by some connecting carrier it is disproportionately large. The movement of these cars to a connection with the Chicago & Alton, the Alton Bridge Company, the Big Four, or the Chicago, Peoria & East St. Louis, in the City of Alton, involves a haul of from one-half to two and a half miles. To reach the Wabash at Edwardsville requires a movement of 15 miles. Treating this Illinois Terminal Railroad as a switching road, which it properly is, the amount received for this service, from \$8.00 to \$12.00 per car, is unreasonably high, to say nothing of the special divisions which yield much more. There can be no doubt that this railroad was constructed for the purpose of exacting, or perhaps more properly extorting, from the different lines with which it connects, these unreasonable divisions; nor is it possible to resist the conviction that these allowances are made by these railroads to the Terminal Company for the sole purpose of obtaining a portion of the traffic of the Illinois Glass Company, not only at Alton but at other points where that company operates.

Just who is to be the final beneficiary of these operations does not so clearly appear. Mr. Ferguson testified that no dividend had ever been paid on this stock. During the year ending June 30, 1904, the company earned, after paying interest on its funded debt, its taxes and making an allowance for depreciation I. C. C. REP.

tion on equipment, a net income of over 16 per cent upon its capital stock, according to the statistical report filed with this Commission; and an examination of that report in connection with the evidence on this hearing makes it probable that upon any fair basis the actual net earnings were much larger. It did not appear whether these three individuals held this stock as their own property or as trustees for the Glass Company whose officers and employees they are. The Glass Company obtains a present advantage in the maintenance of its switching tracks and the low price at which certain important services are performed. It will obtain the ultimate benefit unless its officers appropriate the profits which are entirely due to the influence exercised by that company.

CONCLUSIONS.

No opinion is expressed as to whether lines leading west from St. Louis may properly apply the St. Louis rate to the station of a *bona fide* transfer company in East St. Louis and absorb the cost of transfer to its depot in St. Louis. Neither is an opinion expressed as to whether these same carriers might, if they saw fit by proper schedules, allow all shippers from East St. Louis a fixed sum per hundred pounds for transporting their merchandise to the receiving depot of the carrier in St. Louis. These questions are not presented by this record. So far as appears from the tariffs referred to in the statement of facts the St. Louis rate is only applied at the depots of connecting railway lines or of transfer companies. No way is provided under these tariffs by which the shipper at East St. Louis can avoid the expense of draying his goods from his storehouse to the depot. When, therefore, the western line allows the Grant Chemical Company 5 cents per hundred pounds for bringing its goods across the river, that being full compensation for the service, this is not only a clear violation of law as a departure from the printed tariff and the payment of a rebate, but is also a manifest discrimination in favor of that company as against its competitor who must dray his goods from the storehouse to the receiving depot in East St. Louis. We think that both the violation of law and the discrimination are equally

clear when that allowance is made to the Eclipse Transfer Company, a corporation using the teams of the Simmons Hardware Company, whose receiving depot is the storehouse of the Simmons Hardware Company and which was organized for the sole purpose of enabling that company to obtain these allowances. In such a case the law looks through the fiction to the actual transaction. This phase of the subject has been already discussed in our previous report in this same investigation touching terminal lines at Chicago. *In the Matter of Divisions of Joint Rates and Other Allowances to Terminal Railroads*, 10 I. C. C. Rep. 385. It is probable that these practices have been resorted to under stress of competition in the belief that they were entirely legal, but we are constrained to reach a different conclusion. While what was disclosed upon this hearing is comparatively insignificant, if the principle be once admitted there is no limit to the discrimination which may result.

It should be further remarked that the railways in interest were not heard. Something may have been overlooked in the examination of their tariffs which would radically change the questions presented.

The testimony does not conclusively show that the Granite City, Alton & Eastern Railroad and the St. Louis Sirup and Preserving Company are identical in ownership. That fact is made reasonably certain by the testimony, however, and inasmuch as such a finding would be of no binding effect upon anyone, it was not thought necessary to continue the investigation for the purpose of obtaining those witnesses who had accurate knowledge. Assuming such identity, the payments made by various railways to the Granite City, Alton & Eastern Railroad are clearly illegal. Not only are they in contravention of the Elkins Amendment of February 19, 1903, but they constitute a rebate under the law as it existed before that amendment. *Wight v. United States*, 167 U. S. 512.

If the Illinois Glass Company owns and operates the Illinois Terminal Railroad the case presented is in all respects identical with the facts developed at the Chicago hearing in this investigation which is above referred to and the conclusions there announced would apply here. If the three gentlemen to whom 10 I. C. C. Rep.—43.

the stock of the railroad company was originally issued and in whose names it now stands are the owners of that property a different question may be presented, although even then the Glass Company obtains an indirect benefit from the extravagant concessions which are made by the carriers to secure the business of that company, and it ought not to be open to either it or the railways to say that the officers of the Glass Company propose to appropriate to themselves the spoils which they secure by means of the corporation whose servants they are.

10 I. C. C. REP.

No. 714.

W. J. KOCH AND H. W. KOCH
v.
THE PENNSYLVANIA RAILROAD COMPANY AND
THE PITTSBURG, CINCINNATI, CHICAGO & ST.
LOUIS RAILWAY COMPANY.

Decided April 11, 1905.

1. Shippers are not entitled as a matter of right to mill grain in transit and forward the milled product under the through rate in force on the grain from the point of origin to the place of ultimate destination; but allowance of the privilege by a carrier to shippers in one section must be without wrongful prejudice to the rights of shippers in another section served by its line.
2. Considering the defendants as a single line, the granting of transit milling west of Pittsburg and denying it to millers at Harrisburg is not necessarily unlawful, because conditions on that line in Ohio and Indiana may be very different from conditions in eastern Pennsylvania, and it does not follow that the allowance of transit privileges in the former territory requires as a matter of law the like allowance in the latter territory; but such differences have not been shown, nor their bearing explained, by the testimony in this proceeding, and upon the meager and incomplete facts now appearing, the Commission is not warranted in making a decision which in principle, if complainants' contention is well founded, would involve a general extension of transit privileges into a large territory where heretofore such privileges have not been allowed. Case continued for further hearing.

Charles H. Koch for complainants.

Francis I. Gowen for defendant Pennsylvania Railroad Company.

10 I. C. C. REP.

REPORT AND OPINION OF THE COMMISSION.

KNAPP, Chairman:

It is alleged in this case that unjust discrimination and wrongful prejudice result from the fact that milling-in-transit and cleaning-in-transit privileges on grain are allowed on the Pennsylvania system west of Pittsburg, but are denied to complainants at Harrisburg, a point east of Pittsburg.

FINDINGS OF FACT.

The complainants, engaged in business under the firm name of W. J. Koch & Company, undertook the construction of a mill at Harrisburg, Pa., in 1900, upon the line of the defendant, the Pennsylvania Railroad Company, and proceeded to the extent of erecting a mill building 48 by 96 feet, ground measurement, and three stories high, but did not install the machinery. The further construction of this mill was suspended because the Pennsylvania Railroad Company refused to allow complainants to bring grain from points west of Pittsburg to their mill at Harrisburg under terms or conditions similar to the milling-in-transit arrangements which were and are still in force on the line of the defendant, the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, hereinafter referred to as the "Pan Handle." The milling arrangements west of Pittsburg also include cleaning-in-transit and clipping-in-transit privileges, which are not allowed east of Pittsburg on the Pennsylvania system, and which were also demanded by and refused to complainants.

The Pan Handle is one of the Pennsylvania lines west of Pittsburg. A majority of its capital stock is owned by the Pennsylvania Company, and the entire capital stock of the latter is owned by the Pennsylvania Railroad Company.

The milling arrangements on the Pan Handle cover wheat, corn, oats, rye and barley. With certain exceptions, not material in this report, the transit milling privilege is allowed on that line at a charge or premium of $1\frac{1}{2}$ cents per 100 pounds above the through rate on the grain from the point where it is shipped to the point where the product consigned from the mill

10 I. C. R. R.

is destined. The product so milled must be forwarded from the mill within 30 days after the grain is received at the mill, except in the case of wheat which may be shipped under the transit arrangement at any time within 90 days. Milled-in-transit products on the Pan Handle are shipped not only to seaboard points but to all points on the Pennsylvania system east of the milling station. The proportion of the through rate accruing to the Pennsylvania is based upon the rate on the product from the point where the grain was shipped. Grain milled at Harrisburg or other milling points in Pennsylvania on the Pennsylvania system must pay the full rate on the grain to the mill and the full rate on the product out from the mill on all shipments to interior points in Pennsylvania.

The resulting advantage to the western milled product is shown by the following illustration: A car of grain containing 40,000 pounds is shipped from a Chicago rate point and milled in transit at Columbus, Ohio. The rate is $15\frac{1}{2}$ cents to Bryn Mawr, Pa., a Philadelphia rate point, and to this must be added the milling-in-transit premium of $1\frac{1}{2}$ cents per 100 pounds, making a total rate of 17 cents, and a total transportation charge of \$68 from the point where the grain shipment originated to the point where the milled product is delivered. The rate from the same Chicago rate point to Harrisburg is $14\frac{1}{2}$ cents, and the local rate on grain products to Bryn Mawr is 8 cents, making a total rate of $22\frac{1}{2}$ cents if the grain is milled at Harrisburg, and a total transportation charge of \$90. This gives the miller west of Pittsburg an advantage of \$22 on the carload, or $5\frac{1}{2}$ cents per 100 pounds. The miller at Harrisburg can hardly compete with western milled grain under such a difference in transportation charges.

Grain shipped from western points on the Pan Handle and destined to points on the Pennsylvania can also be cleaned or, in case of oats, clipped at mills upon the line of the Pan Handle, and if reshipped within a period of 72 hours no charge over the through rate from the point of origin to final destination is made. This privilege is denied at milling points on the Pennsylvania proper. Upon request of complainants, the Pennsylvania agreed to allow a stop-over privilege for the purpose of 10 I. C. C. REP.

cleaning and clipping grain arriving via the "Union Line" only, which operates over the Pan Handle, an extra charge of \$1.00 per car to be exacted for that privilege, and the reconsignment to be made within 48 hours. There were some other conditions attached to the offer which need not be stated in this report.

The tariffs filed with the Commission do not show that the eastern trunk lines north of the Pennsylvania system allow milling-in-transit on western grain at any point east of Buffalo, Pittsburg, or other western termini of the trunk lines, when the product is destined to interior eastern points, but it appears that the Baltimore & Ohio permits the practice at any station on its line when the product is shipped to a point to which through rates are in effect. No transit arrangements have been filed with the Commission by the Delaware, Lackawanna & Western Railroad Company or the New York Central & Hudson River Railroad Company. The Lehigh Valley tariff allows the transit privilege at Towanda, Pa., on grain originating at numerous points on its line in New York. The Central of New Jersey tariff provides for milling-in-transit at Wilkes Barre and Taylor, Pa., when the product is shipped to New York City, Jersey City, or Newark, N. J. The Erie tariff apparently allows milling-in-transit of western grain only at points west of the western termini of the trunk lines. The Pennsylvania permits milling-in-transit on wheat and corn originating west of Pittsburg, at points east of Pittsburg, including Harrisburg, only when the product is shipped to New York, Philadelphia or Baltimore, and then the charge for milling at points on the direct line, like Harrisburg, is $1\frac{1}{2}$ cents above the through rate. Certain higher premiums or arbitraries are charged to mills at specified points not on the direct line. This is done by the Pennsylvania to enable local mills in Pennsylvania to compete with other mills for the export trade and also for the domestic trade in New York, Philadelphia and Baltimore. This privilege does not extend to rye, oats or barley. The Pennsylvania declines, however, as before found, to grant a like privilege whereby mills at Harrisburg, or other points east of Pittsburg, would be able to compete on even terms at interior points with flour and other grain products milled west of Pittsburg. It places its re-

10 I. C. C. REP.

fusal to do this upon two grounds: First, that it would thereby be improperly deprived of revenue it now secures under the application of local rates from mill points on its line east of Pittsburgh; and, Second, that granting the concession would injure the local millers at places to or near which the Pennsylvania milled product would be consigned and sold.

Grain products can be purchased west of Pittsburgh and shipped to interior points in Pennsylvania, New Jersey and Delaware as freely and with as much facility as grain can be purchased and shipped from the same points of origin; and no reason is shown why the western milled product does not compete with local mills reached by the Pennsylvania as forcefully as would be the case if the product were milled east of Pittsburgh. To the extent, therefore, that the interior trade of eastern Pennsylvania in carload lots of grain products milled from western grain is now supplied from mills west of Pittsburgh, it would not apparently place additional hardship upon the local miller in Pennsylvania, or deprive the Pennsylvania in any material degree of revenue it now secures, if the transit privilege for grain coming from west of Pittsburgh should be put in effect at Harrisburg. It would simply be giving the Harrisburg miller a share of the trade which now goes to the miller west of Pittsburgh. That is precisely what the Pennsylvania is now doing as to the grain products traffic to New York, Philadelphia and Baltimore. To enable the Pennsylvania miller to compete with mills west of Pittsburgh and with millers on other lines leading to these great domestic markets and export points, it has granted the transit privilege on wheat and corn, the two great staple grains, at Harrisburg and other points on its line. If it did not do this, the western millers would supply the trade, so far at least as its line is concerned, and apparently it suffers no material loss of revenue by allowing the practice in Pennsylvania for products destined to these seaboard cities.

There are several large mills near Harrisburg and at other points in eastern Pennsylvania which, under the transit privilege for products destined to New York, Philadelphia and Baltimore, engage quite largely not only in the exportation of grain products but also in supplying the domestic demand in those

10 I. C. C. REP.

cities. These mills do considerable business in shipping less than carload quantities locally in eastern Pennsylvania. Apparently they cannot compete with western milled product for the carload trade to local points, that is, by grinding western grain at their mills and reshipping the same, in the absence of the transit privilege for products to interior localities, or some other concession from the established in-and-out tariff charges. It is possible that allowing at Harrisburg the transit privilege for interior points might interfere to some extent with less than carload shipments from mills already established, but just how that would occur does not appear.

What has been found above as to the local mills in Pennsylvania and the revenue of the Pennsylvania may bear this qualification: Considerable quantities of local grain are brought to these mills at local rates, and after milling the product is shipped out at local rates to interior points. With comparatively low rates applying on short hauls to and from the mills on this grain and its product, it may be that extension of the transit privilege to points east of Pittsburg would operate in some degree to change the trade situation, so that local grain milled in Pennsylvania would be placed at a disadvantage and the revenue now derived by the carrier from this local grain and its product materially diminished, but there is no definite disclosure in this regard. Moreover, what the Pennsylvania obtains from rates on the western milled product and what it would receive under transit milling at Harrisburg of western grain are facts not clearly shown in the record, and we are unable to determine with certainty whether some loss of revenue would or would not result.

Any extension of the transit privilege to the Harrisburg miller virtually involves allowance of a like privilege to all other millers east of Pittsburg upon the lines of the Pennsylvania, and perhaps to all eastern millers on other roads in that section of country.

Apparently the transit privilege for products to interior points would be as valuable to mills already established east of Pittsburg as it would be to complainants, whose mill has not been completed. Under present conditions the established

mills can, and complainants' mill could, if in operation, grind and ship grain grown east of the Alleghenies; grind western grain and ship the product in less than carloads; and grind western grain and ship the product to New York, Philadelphia and Baltimore, on even terms with the miller west of Pittsburg. The evidence fails to show whether western milled products are in fact absorbing the trade at interior points of consumption east of Pittsburg, or to what extent that trade is supplied by eastern mills. Indeed, this record is made solely by the testimony of one of the complainants and the testimony of the traffic manager of the Pennsylvania, with some exhibits put in on behalf of complainants. The testimony for complainants is little more than a showing that their mill, if in operation, would not be able to compete in the milling of western grain with western milled products destined to interior points. What compensating advantages, if any, are enjoyed by the established millers in eastern Pennsylvania—and they appear to be quite numerous—and how the transit privilege asked for would affect the millers in that section who depend mainly upon local grain, are matters concerning which we have no information, as the testimony barely touches this aspect of the case and is so general in character as to be of little value in determining the actual or probable effect upon the milling industry of Pennsylvania of the change demanded by complainants.

CONCLUSIONS.

It seems unnecessary to determine upon the present record whether, as complainants contend, the ownership of a majority of the capital stock of the Pan Handle by the Pennsylvania Railroad Company, through the medium of the Pennsylvania Company, operates to charge the former with responsibility for the rates and regulations in force on the Pan Handle line.

Shippers are not entitled as a matter of right to mill grain in transit and forward the milled product under the through rate in force on the grain from the point of origin to the place of ultimate destination (*Diamond Mills v. B. & M. R. R.* 9 I. C. C. Rep. 311), but allowance of the privilege by a carrier to ship—
10 I. C. C. REP.

pers in one section must be without wrongful prejudice to the rights of shippers in another section served by its line.

Considering the defendants as a single line, the granting of transit milling west of Pittsburg and denying it to millers at Harrisburg is not necessarily unlawful. The conditions on the Pan Handle in Ohio and Indiana may be very different from the conditions in eastern Pennsylvania, and it does not follow that the allowance of transit privileges in the former territory requires as a matter of law the like allowance in the latter territory. But these differences have not been shown nor their bearing explained by the testimony in this proceeding. About all that appears on behalf of complainants, and perhaps all they were bound to show, is the fact, illustrated by examples, that western milled products have an important advantage over western grain milled at Harrisburg and reconsigned as product to interior destinations, because the Harrisburg miller is refused transit privileges which the western miller enjoys. On the other hand, the defendants have submitted only general grounds of justification, without any satisfactory showing as to the difference between western and eastern conditions or the probable effect upon the various interests concerned of a milling-in-transit privilege at Harrisburg. In short, there is failure to disclose the whole situation and develop all the facts and circumstances which apparently should be taken into account; and we are virtually called upon to decide the case upon the assertion of injustice by complainants and what amount to general denials by defendants, accompanied with a declaration that it is the policy of the Pennsylvania Railroad to restrict the transit privilege and prevent its extension. In pursuance of that policy the transit privilege is allowed in Pennsylvania only for products destined to the great competitive seaboard markets, and this for the purpose of allowing Pennsylvania millers to engage in that trade.

But it is difficult to see, in the absence of proof respecting local conditions, why the reason for protecting Pennsylvania millers does not apply as well to the interior trade in carload quantities of grain products. The western milled products compete as strongly with Pennsylvania mills for the trade at interior points as they do with Pennsylvania mills for the seaboard

trade. The only difference between the two classes of trade is that the seaboard traffic in part is carried by other lines, while the interior trade is confined to Pennsylvania Railroad points and is carried only by that line. Such difference shows carriers' competition at the seaboard which does not exist at these interior points, but it does not show more forceful trade or milling competition for the seaboard trade than for the trade in the interior. There may be compensating advantages accruing to the Pennsylvania millers in relation to the distribution of grain products to interior points, but as to this we are not advised.

Upon the meager and incomplete facts now appearing, we do not feel warranted in making a decision which in principle, if complainants' contention is well founded would involve a general extension of transit privileges into a large territory where heretofore such privileges have not been allowed. It is evident that the question raised affects numerous interests in a considerable section of country, and apparently other lines as well as the Pennsylvania, and therefore ought not to be determined without a more comprehensive and careful inquiry than this record permits.

For the reasons thus briefly stated, the case will be continued for further hearing at a time and place to be hereafter fixed.

10 I. C. C. REP.

No. 785.

H. B. PITTS & SON

v.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY
AND TEXAS & PACIFIC RAILWAY COMPANY.

Decided April 24, 1905.

Complainants shipped two carloads of snapped corn over the railways of the St. Louis & San Francisco and Texas & Pacific companies, from Grove, Indian Territory, to Marshall, Texas. On one carload defendants exacted a charge of 44½ cents per 100 pounds and on the other 31½ cents. The only published rates in effect and applicable to the shipments were, an interstate rate of the former company of 21 cents per 100 pounds plus 25 per cent for the transportation to Paris, Texas, and a proportional rate of the latter for transportation from Paris to Marshall of 14½ cents, except that the T. & P. Company's tariff provided that lower combinations by other roads would be protected. Upon one shipment the tariff purporting to name the rates was an association tariff consisting of 297 pages, filled with notes, exceptions and special references, indicated by a host of arbitrary signs, and was so involved that the freight officials of the carriers could not agree, and the Auditor of the Commission found it difficult to determine the rate which did apply. *Held:*

1. That the rate of the St. L. & S. F. Company for the transportation to Paris was excessive and unreasonable to the extent that it exceeded 21 cents per 100 pounds.
2. That the proportional rate of the T. & P. Company of 14½ cents per 100 pounds is assumed to be reasonable.
3. That complainants are entitled to reparation to the extent that the charges exacted from them exceeded 35½ cents per 100 pounds.
4. That it is the duty of railroad companies, under the Act to regulate commerce, to print, publish and file tariffs showing rates which are so simplified that persons of ordinary comprehension can understand them; and that a notation in the tariff of one carrier making reference to the tariff of some competing carrier does not meet the requirement of the law that the rate charged shall be published and filed.

10 I. C. C. REP.

W. L. Pitts for complainant.

Hiram Glass for St. L. & S. F. R. Co. and T. & P. Ry. Co.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, *Commissioner*:

The complainants in this case are merchants doing a wholesale hay and grain business at Marshall, Texas, under the firm style of H. B. Pitts & Son, and they claim to recover of the defendants an overcharge growing out of the transportation of two carloads of snapped corn from Grove, Indian Territory, to Marshall, Texas. The corn was delivered in each case to the St. Louis & San Francisco Company at Grove, by it transported to Paris, Texas, and there delivered to the Texas & Pacific Company, which carried it to Marshall. The first shipment was in January, 1903, and weighed 48,744 pounds. The second was in May of the same year and weighed 40,500 pounds. The rate charged and collected upon the first shipment was $44\frac{1}{2}$ cents per 100 pounds; upon the second shipment $31\frac{1}{2}$ cents per 100 pounds. The complainants insist that it should have been $35\frac{1}{2}$ cents upon both shipments.

For some time previous to December, 1902, there had been in effect a joint through rate on corn from Grove and corresponding points in Indian Territory, to Marshall, and corresponding points in Texas, via the route in question, of about 30 cents per 100 pounds. Owing to certain disputes with reference to the privilege of milling-in-transit, this joint rate was canceled by the St. Louis & San Francisco Company. Thereupon the Texas & Pacific Company put in effect from Paris to Marshall what it denominated a proportional interstate rate, which applied on interstate shipments delivered to it by the St. Louis & San Francisco Company at Paris for transportation to some other point in the state of Texas. The local rate fixed by the Texas Commission from Paris to Marshall would have been $12\frac{1}{2}$ cents per 100 pounds, but this so-called interstate proportional rate for the same haul was $14\frac{1}{2}$ cents per 100 pounds. The General Freight Agent of the Texas & Pacific

10 I. C. C. REP.

Company stated that in his opinion the local Texas rate was unreasonably low, and that for this reason his company insisted in case of interstate shipments upon the higher rate.

At the time of both these shipments there was in effect an interstate rate from Grove to Paris, Texas, by the St. Louis & San Francisco Railroad, of 21 cents on corn. The tariff provided that snapped corn should take a rate 25 per cent above that applicable to shelled corn. Snapped corn is corn in the shuck, and it was said that the higher rate was imposed for the reason that snapped corn was more bulky and therefore less desirable freight. No distinction is made in the Texas Commission tariff or in the interstate tariff of the Texas & Pacific Company between corn and snapped corn, nor do we find such a distinction in the tariff of other lines operating in that territory.

When the first carload was received the agent of the Texas & Pacific endeavored to ascertain the proper rate to apply for the haul by the St. Louis & San Francisco up to Paris, and in some way got the impression that this was 30 cents. He, accordingly, added to this the interstate rate upon his own line, $14\frac{1}{2}$ cents, making a total rate of $44\frac{1}{2}$ cents. The complainants protested against this charge, but finally paid the rate in order to obtain possession of their corn. The Texas & Pacific Company retained the $14\frac{1}{2}$ cents per 100 pounds of the sum thus collected and passed the balance over to the St. Louis & San Francisco.

The General Freight Agent of the Texas & Pacific Company stated that his tariffs provided that where a lower rate could be made by any combination than that by which the traffic actually moved such combination would be protected. The second carload for some unexplained reason was billed from Grove at $31\frac{1}{2}$ cents per 100 pounds, and the agent of the Texas & Pacific, upon the supposition that this was the rate by some other line, collected that amount upon delivery of the shipment. It was said on the hearing that there was in fact no competing rate of $31\frac{1}{2}$ cents, but that a combination could be made by another line of $35\frac{1}{2}$ cents. The St. Louis & San Francisco Company and the Texas & Pacific Company have in

effect an arrangement that joint rates shall be divided equally in cases corresponding to a through shipment from Grove to Marshall. Since this rate of 31½ cents, made to protect a supposed competitive rate by some other line, was regarded as a joint rate, the Texas & Pacific retained one-half of it and paid the other half over to the St. Louis & San Francisco.

These shipments were received by the St. Louis & San Francisco at Grove, billed to Marshall, Texas, and were transported by that company to Paris and there delivered to the Texas & Pacific for carriage to destination. The Texas & Pacific received and treated the shipment as interstate although its service was entirely within the state of Texas. The shipment was, therefore, in the contemplation of both these defendants an interstate shipment. Ordinarily, this Commission has no jurisdiction over the division of a through rate as such, but since, in this case, the carriers have voluntarily agreed that the total rate shall be made up of two independent interstate rates, we may inquire into the reasonableness of these rates by themselves.

The distance from Grove to Paris is 297 miles. The regular distance tariff applicable to the movement of corn between those points was and is 21 cents per 100 pounds, with a minimum of 30,000 pounds. No distinction had been made in the tariffs of the St. Louis & San Francisco between corn and snapped corn until December 10, 1902. One of these carloads weighed 48,744 pounds; the other 40,500 pounds. Without deciding whether this defendant may properly make a distinction between shelled corn and snapped corn, and without deciding whether its present tariff upon those commodities is or is not reasonable, as a local rate to Paris, we feel clear that 21 cents for the movement of these two carloads when that movement is part of a total through movement of 450 miles is sufficiently high, and that any charge above that would be unreasonable. The distance from Paris to Marshall is 158 miles. We assume, without deciding, that the interstate rate of the Texas & Pacific on corn is reasonable. This would make the reasonable through rate 35½ cents, divided 14½ cents to the 10 I. C. C. REP.

Texas & Pacific and 21 cents to the St. Louis & San Francisco.

The difference between what the complainants have actually paid for these two shipments and what they should have paid at a rate of $35\frac{1}{2}$ cents is \$27.67.

CONCLUSIONS.

The provision in the tariff of the Texas & Pacific Company that lower combinations by other routes will be protected, can not be regarded as the legal publication of a rate by that company. The purpose in requiring rates to be published and posted is to inform the public of the rates of transportation at which shipment can be made. A notation in the tariff of one carrier making reference to the tariff of some competing carrier, a tariff which may not be accessible to the prospective shipper, cannot meet the requirements of the law that the rate charged shall be published and posted. The only legal tariff under which this shipment moved was the interstate tariff of the St. Louis & San Francisco Company to Paris, plus the interstate proportional tariff of the Texas & Pacific from Paris to Marshall.

We have decided that the published rate of the St. Louis & San Francisco Company on snapped corn, when applied to shipments of this loading destined to Marshall, was unreasonably high, and that this company ought not to have exacted more than 21 cents. The Texas & Pacific should, therefore, have collected $35\frac{1}{2}$ cents per 100 pounds, retained $14\frac{1}{2}$ cents, and paid over to the St. Louis & San Francisco Company the balance. In point of fact, it has retained more than $14\frac{1}{2}$ cents per 100 pounds out of the amount collected by it, and it has, therefore, to-day, as between it and the St. Louis & San Francisco Company, more than it is entitled to retain. The St. Louis & San Francisco Company received on the first shipment 9 cents per 100 pounds, or \$43.87 more than was reasonable. On the second shipment it did not receive as much as it was entitled to, partly because the complainants did not pay as much to the Texas & Pacific as they should, and partly

because the latter company retained more than its legal proportion of the rate. This Commission, probably, has no authority to off-set these claims of the complainant against the St. Louis & San Francisco, and the St. Louis & San Francisco against the complainant; but inasmuch as the complainant is willing to have an order to that effect entered, an order will be made directing the St. Louis & San Francisco to pay to the complainants the sum of \$27.67, with interest from October 28, 1904, the date of filing the complaint. Interest should properly be reckoned from the payment of the freight upon the first shipment, but the date of that payment does not appear from this record.

This holding apparently sanctions a rate of 35½ cents from Grove to Marshall, a distance of 450 miles. It is proper, therefore, to observe that we have not passed upon the reasonableness of that rate. The complainants sought to recover what they had paid over and above a rate of 35½ cents and their contention has been sustained.

It also seems proper to refer to the deplorable condition of the tariffs under which this traffic moved. These are published by the Southwestern Tariff Committee, which prints a single tariff for the 16 railroads which appear to be members of that Association. If the prospective shipper of grain at Grove, Indian Territory, had wished to consult the posted schedules for the purpose of ascertaining the rate on grain from that point to Marshall, Texas, he would have found, or been given a bundle of papers consisting of 297 pages, made up of an original tariff of 129 pages and supplements of 168 pages. This mass of papers does not purport to name all rates, but simply those on grain, grain products, hay and straw in carloads. It is filled with notes, observations, explanations, exceptions, special notices, special notes and references by means of a host of arbitrary signs, the comprehension of which would alone require days of study.

There were present upon the hearing of this case the General Freight Agent of the Texas & Pacific and the Chief Rate Clerk of the St. Louis & San Francisco. While they agreed as to the rate which should have been imposed according to the pub-

10 I. C. C. REP.—44.

lished schedules upon the first shipment, they did not agree themselves as to the rate applicable to the second shipment. Upon returning to Washington the Commission requested from the office of its Auditor a report showing what tariff rate would apply to the movement of these two carloads of snapped corn, requesting as prompt a reply as possible. A question of that kind would be correctly answered in a few moments from an examination of the tariffs in most parts of the country. It was only after two days spent in the examination of these tariffs that our Auditor, whom we have found a most efficient man, reached a conclusion which satisfied him. The rate reported by him agreed with that of the railroad officials as to the first shipment, but was different as to the last shipment from that of either the General Freight Agent of the Texas & Pacific or the Chief Rate Clerk of the St. Louis & San Francisco.

When the St. Louis & San Francisco Railroad Company hangs up in its station a document of that kind as a publication of its rates on corn it fails to comply, in our opinion, with either the letter or the spirit of the 6th section. Each railroad should print, post and file a tariff showing its own rates, and those tariffs should be so simplified that persons of ordinary comprehension can understand them. That this is possible sufficiently appears from the fact that it is done elsewhere.

An order will issue in accordance with the above conclusions.

10 I. C. C. REP.

No. 743.

H. B. PITTS & SON

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; TEXAS & PACIFIC RAILWAY COMPANY; INTERNATIONAL & GREAT NORTHERN RAILROAD COMPANY; AND MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

Decided April 24, 1905.

1. Facts stated concerning shipments of hay by complainant over the railways of the Atchison, Topeka & Santa Fe and Texas & Pacific Companies, from Robinson and La Junta, Colo., and Dodge City, Kans., to Marshall, Jefferson and Kildare, Tex. *Held:* That the proportional rates per 100 pounds charged by the former company were excessive and unreasonable to the extent that they exceeded 21 cents for the transportation to Fort Worth, Tex., and those of the latter company excessive and unreasonable to the extent that they exceeded 15 cents for the transportation from Fort Worth to the destinations named, and that complainant is entitled to reparation from the A., T. & S. F. R. Co. in the sum of \$196.84, and from the T. & P. Co. in the sum of \$51.95, with interest from August 1, 1903.
2. Neither the International & Great Northern Railroad Company nor the Missouri, Kansas & Texas Railway Company was a party to the transportation here in question, and as to those carriers the complaint is dismissed.

W. L. Pitts for complainant.

Hiram Glass for Texas & Pacific Railway Company.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, *Commissioner:*

The complainants are H. B. Pitts and W. L. Pitts, engaged
10 I. C. C. REP.

in the business of handling hay and grain at Marshall, Texas, under the firm style of H. B. Pitts & Son. The defendants are the Atchison, Topeka & Santa Fe Railway Company, the Texas & Pacific Railway Company, the International & Great Northern Railroad Company and the Missouri, Kansas & Texas Railway Company. The two last-named carriers in no way participated in the transactions involved in this proceeding.

The complainants claim to recover certain overcharges upon seven carloads of hay. The date of shipment, point of origin, destination, weight, and amount paid in case of each carload are given below:

	Date.	From.	To.	Pounds.	Amount.
Jan'y	3, 1903,	Robinson, Colo.	Marshall, Tex.	18,846	\$101.30
Jan'y	9, 1903,	" "	" "	19,708	105.93
Jan'y	12, 1903,	" "	Jefferson, "	17,000	76.50
Jan'y	12, 1903,	" "	" "	19,700	88.05
Jan'y	12, 1903,	" "	" "	21,400	115.03
Jan'y	15, 1903,	Dodge City, Kans.	" "	19,600	134.15
July	9, 1903,	La Junta, Colo.	Kildare, "	22,000	124.85

These shipments were in all cases received by the Atchison, Topeka & Santa Fe Company, billed to destination, transported by that company to Ft. Worth, Texas, and there delivered to the Texas & Pacific, by which they were carried to destination.

The Atchison, Topeka & Santa Fe Company was not represented upon the hearing and while permission was given that company to file with the Commission any statement it might desire, that privilege has not been availed of. We have therefore only the answer of that defendant. The General Freight Agent of the Texas & Pacific Railway Company appeared and testified upon the hearing. The tariffs of these defendants are in such confusion that no one connected with this office can determine from them with any degree of certainty what the published rate on hay between these points has been or is. One of the complainants testified that up to about January 1, 1903, there was in effect by the line of these defendants a joint through rate of 36 cents per 100 pounds, which would have applied to the movement of these carloads of hay, and he produced expense bills which showed apparently that he had made

shipments from corresponding points by those lines at that rate as late as January 1, 1903. The testimony of the Texas & Pacific tended to show that such a rate had formerly been in effect, but that it was withdrawn about November, 1902. The answer of the Atchison, Topeka & Santa Fe states that on September 11, 1903, a joint through rate of 36 cents was established which would be applicable to shipments like those in question and it is the opinion of our Auditor that the tariffs so indicate. Upon this testimony we find that for some time previous to December, 1902, the Atchison, Topeka & Santa Fe and the Texas & Pacific had in effect a joint through rate of 36 cents per 100 pounds from the points of origin to the points of destination embraced in this case upon hay, and that a similar rate has been in effect since September 11, 1903, and is now in effect.

The agent of the Texas & Pacific testified that owing to some disagreement between the Santa Fe Company and his company, the former had in the latter part of the year 1902 canceled its joint rates on grain and grain products and hay; that thereupon the Texas & Pacific put in effect a rate of $18\frac{3}{4}$ cents upon hay from Ft. Worth to Marshall, Kildare and Jefferson applicable to traffic received from the Atchison, Topeka & Santa Fe at Ft. Worth. Upon the shipments in question it added this rate of $18\frac{3}{4}$ cents to whatever rate had been charged by the Atchison up to Ft. Worth; collected the entire amount at destination of the complainants; retained $18\frac{3}{4}$ cents, and paid over the balance to the Atchison Company. The rate on hay established by the Texas Commission from Ft. Worth to these destinations is 15 cents, but the General Freight Agent of the Texas & Pacific was of the opinion that this rate was unreasonably low.

The claim of the complainants is that they should have been accorded a rate of 36 cents and that any charge above that rate is unjust and unreasonable. Plainly this record presents no facts from which we can determine as an independent proposition the inherent reasonableness of these rates. It is about 775 miles from Robinson and La Junta to Ft. Worth; 575 miles from Dodge City; from Ft. Worth to the points of destination
10 I. C. C. REP.

by the Texas & Pacific it is approximately 200 miles. Thirty-six cents for a haul of that length upon this commodity is a low rate upon the lines in question. But it appears that these defendants have maintained that rate for years with the exception of a short interval of some seven or eight months during which these shipments were made, and that the reason for not maintaining it during that period was not because the rate was too low, but because the defendants had fallen into some disagreement as to the right of milling in transit. We are inclined to hold entirely upon the unexplained admission arising from the act of these defendants in maintaining for years a rate of 36 cents, that this is a reasonable rate; that anything higher is unreasonable and that the defendants should have applied that rate to the shipments in question.

This shipment was moved in the contemplation of both parties as a through shipment from the points of origin to destination. There was, however, in effect at the time no joint rate. The shipments were carried upon two separate interstate rates, one over the Santa Fe from the points of origin to Ft. Worth, and the other by the Texas & Pacific from Ft. Worth to destination. We must determine, therefore, what sum each defendant might reasonably have charged for its service. Here, again, we are without any facts upon which to base an intelligent conclusion. The General Freight Agent of the Texas & Pacific testified that while he did not remember the divisions of the joint rate of 36 cents, it was probable his company received as its share $18\frac{3}{4}$ cents, or the sum named by it as a proportional interstate rate when the joint rate was canceled by the Santa Fe. The distance by the Santa Fe, as already seen, is 775 miles from two stations, and 575 miles from the other, while the haul of the Texas & Pacific is only about 200 miles. There is evidently, however, some competitive condition which has induced the Santa Fe to accept for its division much less than would result from the adoption of a mileage basis. Did not the facts justify the allowance of what seems to be a disproportionate division to the Texas & Pacific we may assume that the Santa Fe, having knowledge of the situation would have placed the actual conditions before the Commission. We do not think,

however, that the Texas & Pacific should be allowed to charge more than its local rate from Ft. Worth upon these shipments. Even if this rate is unreasonably low as applied to a local shipment, and we express no opinion to that effect, it is certainly sufficiently high when considered as a part of a haul of nearly 1,000 miles. We have, therefore, allowed the Texas & Pacific 15 cents per 100 pounds, and the Atchison, Topeka & Santa Fe 21 cents per 100 pounds, for the transportation of this hay. On this basis the Texas & Pacific has collected \$51.95 and the Atchison, Topeka & Santa Fe \$196.84 more than a reasonable compensation, and should repay those sums to the complainants.

CONCLUSIONS.

Upon the foregoing findings of fact the International & Great Northern Railroad Company and the Missouri, Kansas & Texas Railway Company should be dismissed. The Atchison, Topeka & Santa Fe Railway Company should be ordered to pay to the complainants \$196.84, and the Texas & Pacific Railway Company \$51.95, with interest from August 1, 1903, that being approximately the date of the last payment of freight by the complainants.

10 I. C. C. REP.

No. 780.

HOPE COTTON OIL COMPANY
v.
TEXAS & PACIFIC RAILWAY COMPANY.

Decided April 24, 1905.

Complainant desired to ship cotton seed in carloads from Louisiana stations on defendant's line to Hope, Ark., at the sum of local rates based upon Texarkana, Ark., which sum was less than the published through charge, but defendant refused to apply its local rate to Texarkana, which was 12½ cents per 100 pounds, on such through shipments, and also refused to allow complainant to ship locally to Texarkana under the 12½ cent rate in force to that point. *Held:* That while defendant was entitled to insist upon the application of the through rate to the through shipment to Hope, it could not lawfully refuse to receive and carry complainant's freight to Texarkana under its local rate to that point, and that complainant is entitled to reparation for damages resulting from its inability to ship 640 tons of cotton seed to Hope which it had contracted for and desired to have transported over defendant's line.

Wm. H. Arnold for complainant.

Hiram Glass for Texas & Pacific Railway Company.

REPORT AND OPINION OF THE COMMISSION.

PROUTY, *Commissioner:*

The Hope Cotton Oil Company is a corporation operating a mill at Hope, Arkansas, for the manufacture of cotton seed into oil and its other products, and it seeks in this proceeding to recover damages of the defendant railway company for alleged refusal to receive and transport certain shipments of cotton seed.

In the fall of 1903 the complainant had in contemplation the purchase of cotton seed at certain stations upon the line of

10 I. C. C. REP.

the defendant railway in Louisiana north of Shreveport for use in its mill. This seed could only reach the mill of the complainant by passing over the road of the defendant to Texarkana, and from there by the St. Louis, Iron Mountain & Southern to Hope. In this view the agent of the complainant applied at the office of the joint agent of the two railways above mentioned at Texarkana for the purpose of ascertaining the rate. The person in charge of the office after consulting his tariffs stated that the rate from the stations in question to Texarkana was $12\frac{1}{2}$ cents per 100 pounds; that the rate from Texarkana to Hope was 5 cents per 100 pounds, and that the through rate would not be more but perhaps less than the combination of these two. It did not very clearly appear what official it was who gave this information, but we find from the evidence that it was the chief clerk in charge of the office, not the joint agent himself.

After receiving this information, the agent of the complainant proceeded to buy at these stations in Louisiana 49 carloads of cotton seed at 20 tons to the car. It was his purpose and expectation to ship this cotton seed to Texarkana at the $12\frac{1}{2}$ -cent rate, and from Texarkana to Hope at the 5-cent rate, and he understood such to be the legal right of the complainant. Seventeen of the 49 cars were actually shipped upon those rates. These cars seem to have been billed to the Hope Cotton Oil Company, Texarkana, care of the St. Louis, Iron Mountain & Southern Railway. When the car arrived at Texarkana it was delivered to the Iron Mountain road and by it transported to Hope. Some question seems to have arisen as to these shipments before the entire 17 cars had gone forward and for this reason, but under circumstances not clearly disclosed by the evidence, the contents of five cars were transferred at Texarkana from the cars of the Texas & Pacific to those of the Iron Mountain by the Hunter Transfer Company. The remaining 32 cars have never been shipped for the following reasons:

As soon as the General Freight Agent of the Texas & Pacific Company ascertained what was being done, he took the ground that this cotton seed was not entitled to a rate of $12\frac{1}{2}$ cents. There was in effect a tariff naming that rate from the stations

10 I. C. C. REP.

in question to Texarkana, and that tariff on its face was without limitation either as to the consignee or the use which should be made of the cotton seed or the route by which its product should be shipped out; but the Texas & Pacific insisted that this schedule applied simply to Texarkana delivery; that these shipments were in fact through shipments from the points of origin to Hope, Arkansas, and that they must go under the appropriate joint rate between the Texas & Pacific and the Iron Mountain companies. There was in effect no such joint commodity rate on cotton seed, but there were joint class rates. Cotton seed is classified in the Western Classification, which would apply to interstate shipments in this territory, as Class A, and the joint rate applicable to Class A was 67 cents. The Texas & Pacific therefore insisted that this commodity should only be received by that company for shipment at that rate and issued instructions to its station agents not to ship it at the rate of 12½ cents.

As soon as the complainant ascertained that there was trouble about the forwarding of the seed, the agent who had purchased the same was sent to these stations for the purpose of straightening the matter out and sending forward the shipments. He requested the agents at the various stations involved to bill the seed in three different ways; first, to the Hope Cotton Oil Company at Texarkana, care of the St. Louis, Iron Mountain & Southern Railway Company; second, to the Hope Cotton Oil Company at Texarkana, care of the Hunter Transfer Company; third, to the Hunter Transfer Company, Texarkana. The agents of the defendant all declined to ship the cotton seed at a 12½-cent rate upon this billing or upon any other billing.

The evidence of the complainant tended to show that they went further and declined to receive the seed for shipment at all so long as the Hope Company was the owner of it. While this may have been so in some instances, we think and find that if the complainant had so desired it could have sent forward this seed upon the joint class rate of 67 cents. That would have been, however, \$13.40 per ton. The seed only cost \$14.00 per ton and the rate which the complainant supposed available was only \$3.50 per ton. To insist upon a rate of 67 cents per 100

10 I. C. C. REP.

pounds was, therefore, for all practical purposes to decline to receive the cotton seed for shipment on any terms.

It is suggested that it may have been the duty of the complainant to pay the rate charged by the defendant and sue to recover the overcharge, but so far as that may be a question of fact or in so far as any finding of fact may be material in determining that issue, we find that the complainant ought not reasonably to have been required to make payment of that rate. To have done so would have required an outlay of more than \$6,000 beyond the rate to which the complainant conceived itself entitled, and upon that basis the cotton seed would have cost it much more at the mill than its actual value, thus involving a large loss if it finally turned out that the complainant was wrong in its contention.

The complainant purchased this cotton seed for use at its mill and it was its purpose in tendering the same to the defendant for shipment to Texarkana that it should finally go forward to Hope. Had shipment been made to the Hunter Transfer Company that company would have removed it from the Texas & Pacific cars for the purpose of sending it forward via the St. Louis, Iron Mountain & Southern. The General Freight Agent of the Texas & Pacific stated in justification of his claim that this tariff ought not to apply to these shipments, that rates on cotton seed were almost invariably made with reference to the final disposition of the product; that the products of cotton seed shipped to Texarkana and manufactured there would find their way to market over his line, while if manufactured at Hope such would not probably be the case. The testimony showed that railroads, in some instances, made unusually low rates upon cotton seed in consideration that the product, or a certain percentage of the product, should be shipped out over the line bringing in the seed. There was, as already stated, no provision to that effect in this tariff, nor did it appear that there was any direct understanding of that kind with the cotton oil mills at Texarkana. Neither can the rate of 12½ cents to Texarkana be regarded as a phenomenally low one. It was said that the average distance from these stations was 50 miles. The distance from Texarkana to Hope is 32 miles and the rate, 10 I. C. C. REP.

which is the Commission rate of Arkansas, 5 cents. The rate on cotton seed oil from Texarkana to New Orleans, a distance of over 400 miles, is $17\frac{1}{2}$ cents.

As we understand the testimony, the contracts for the purchase of this seed were in writing and in most, if not all cases, the complainant also made a part payment on the contract. No question is made as to the binding obligation of the contracts. When it became evident that the seed could not be shipped at the $12\frac{1}{2}$ -cent rate, these contracts were rescinded by mutual agreement. Whatever money the complainant had advanced was returned or applied on account of seed actually shipped and the seed not shipped was retained by the original owners. No damage is claimed by the complainant in this particular.

The complainant did claim to recover the sum of \$3.50 per ton as damages which it had sustained by reason of its inability to take the seed under the aforesaid contracts. The manager of the complainant testified that his company would have made a profit of \$3.50 per ton upon this 640 tons of cotton seed. He also testified that later in this same season the price of cotton seed advanced, being at his mill as high as \$21.00 per ton. The contract price of this seed was \$14.00 per ton and the freight rate at $12\frac{1}{2}$ cents to Texarkana and 5 cents from Texarkana amounted to \$3.50 per ton, making the cost at the mill \$7.50 per ton. The expense of transfer at Texarkana would have been 20 cents per ton more. We find that the complainant had purchased 640 tons of this cotton seed, that it was unable to transport the same to its mill owing to the refusal of the defendant to make shipment, and that this seed would have been worth to the complainant at its mill \$3.50 per ton more than the cost to the complainant of getting it there upon a rate of $12\frac{1}{2}$ cents per 100 pounds to Texarkana, 20 cents per ton transfer, and 5 cents per 100 pounds from Texarkana to Hope.

The complainant also claimed to recover as damages \$20 paid the Hunter Transfer Company for transferring five carloads at Texarkana. We find that the Hunter Transfer Company did make the transfer and that the complainant did pay \$20 for that service.

The complainant also claimed to recover \$28.52, that being the expense of sending its agent to these stations upon the line of the defendant at which the cotton seed was awaiting shipment for the purpose of obtaining such shipment. We find that the above amount was paid by the complainant for that purpose.

Another item of damage claimed by the complainant was the increased cost of certain hulls which it had been obliged to purchase. It seems that earlier in the season the complainant had contracted to feed certain cattle with hulls which it expected at that time to produce at its mill. The season was a short one, the quantity of hulls produced unusually small, in consequence of which the complainant was obliged to purchase hulls to fill its contract. Its claim was that the cost of these hulls and the expense of taking them to its factory was greater than as though the hulls had been produced by the manufacture of this seed. The quantity of hulls which would actually have resulted from the manufacture of these 640 tons of seed would have been very much less than the amount purchased by the complainant, and we think this item is already embraced in our allowance of \$3.50 per ton.

The complainant still further claimed that but for the refusal of the defendant to apply the 12½-cent rate to Texarkana it would have bought other cotton seed in this section from which additional profits would have accrued, and its testimony tended to show that it might probably have made such purchase. There is, however, nothing in this record upon which a finding as to the amount of such probable purchases can be based.

The complainant insisted that it relied upon the representation of the joint agent of the Texas & Pacific and the St. Louis, Iron Mountain & Southern at Texarkana that the through rate would not exceed 17½ cents. We find that the person in charge of this office only intended to give the agent of the complainant such information as the tariffs themselves afforded, and that the agent of the complainant so understood it. No attempt was made to quote any joint through rate, as sufficiently appears from the fact that the first shipments which

10 I. C. C. REP.

actually went through to Hope were not billed to the complainant at Hope, as they would have been in case of a through shipment upon a joint rate, but to the complainant at Texarkana in care of the St. Louis, Iron Mountain & Southern Railway.

The testimony shows that cotton mills do not ordinarily run the entire year, for the reason that the supply of seed from one crop is exhausted before the next crop becomes available. It appeared that the mill of the complainant was obliged to shut down this year earlier than usual through inability to obtain seed with which to operate.

CONCLUSIONS.

Was the complainant entitled to ship this cotton seed to Texarkana upon a rate of 12½ cents?

We express no opinion as to whether the defendant might lawfully make a special rate on this commodity upon condition that it was consumed in mills located at Texarkana, or upon condition that the product, or a portion of the product, which resulted from the consumption of the seed should be shipped out over the line of the defendant. These questions are not presented by this record, for the tariff in question contained no limitation whatever.

The defendant urges, however, that the tariff applied only to local shipments to Texarkana and that the real movement of this cotton seed was to Hope, Arkansas; hence, it might properly refuse to apply this rate to that movement.

It was the purpose of the complainant to send these cars over the line of the defendant to Texarkana, and from Texarkana to Hope by the St. Louis, Iron Mountain & Southern; and the first carloads were in fact taken through to destination in that manner. This we think was a continuous shipment from the point of origin to Hope. If so, the Texas & Pacific was clearly within the law in insisting that the 12½-cent rate to Texarkana should not apply. It might possibly, had it seen fit, have treated a delivery to the Iron Mountain road at Texarkana as a completion of its contract for carriage, and the Iron Mountain road might in its turn, perhaps, have treated the shipment

as a local undertaking from Texarkana to Hope; but it seems plain to us that the Texas & Pacific might also, if it elected, and perhaps should insist upon the transaction being interpreted according to the fact. If there was in effect a joint through rate applicable to this movement, it was the right and possibly the duty of the defendant to insist upon the application of that rate.

Suppose this case were reversed, that there was in effect a joint through rate upon this commodity between Hope and these stations in Louisiana less than the sum of the rates to and from Texarkana. Clearly, these railroad companies would have no right to treat these shipments as two distinct local transactions, thereby obtaining the higher local rates. Not only does the 7th section of the Act to regulate commerce specifically forbid this, but without that section no such subterfuge would be permitted. So, in this case, if the complainant actually ships through from a point on the defendant's line in Louisiana to Hope over these two railroads, that should be treated as a through shipment.

The Hope company, however, attempted to ship this cotton seed to Texarkana, and to receive a delivery of it at Texarkana for the purpose of subsequently reshipping it by the St. Louis, Iron Mountain & Southern to Hope. In so doing we think the complainant was within its legal right. The tariff of the defendant named this rate of 12½ cents to Texarkana and no limitation was placed upon the use of that rate. Under the tariff any person might ship to any other person. The defendant had no right to refuse to receive shipments because some particular disposition was to be made of the cotton seed upon its arrival in Texarkana. It might insist that the seed should be delivered at Texarkana and removed from the car, but it could not go further and say that the Hope Company, having taken possession of it, might not subsequently deliver it to the Iron Mountain road for transportation to Hope. While the movement in that case would be an interstate movement which Congress might, if it saw fit, control, it would not be a through shipment by rail, which now falls within the Act to regulate commerce. It follows, therefore, that in declining to receive

10 I. C. C. REP.

this cotton seed for movement to and delivery at Texarkana upon the published rate of 12½ cents, the defendant was in violation of law.

The complainant had under contract 640 tons of cotton seed which, but for the unlawful conduct of the defendant, it would have transported to its mill and used there. It needed this seed in its business, as appears from the fact that it was compelled to shut down earlier than usual for want of supplies. It has been found that the seed at the mill would have been worth to the complainant \$3.50 per ton more than the cost of getting it there. Upon this finding of fact the complainant is entitled to recover as damages the sum of \$2,240. Such damages are not speculative. They arise out of an actual transaction and are susceptible of exact computation. The profits which the complainant claims it would have made upon the purchase of other seed are upon this record too problematic to admit of ascertainment and must therefore be disallowed.

The complainant is not entitled to recover the \$20 which it paid for transferring the five cars of seed at Texarkana, for the defendant was under no legal obligation to make this transfer or permit its cars to go forward. Neither is the complainant entitled to recover the \$28.52 which it expended in attempting to prevail upon the agents of the defendant to send forward this seed. While that was an expense which grew out of the unlawful refusal of the defendant, it was not the direct and natural result of that act.

The Commissioner who heard the testimony in this case suggested that it might be the duty of a shipper under these circumstances to pay the rate demanded and sue for the overcharge, but further consideration leads to the conclusion that such cannot be the law. While a plaintiff may not unnecessarily aggravate his damages, but must rather use reasonable care to mitigate them, this duty can hardly extend to complying with an unlawful demand of the defendant. If the defendant insists upon that demand it must assume the consequences which may naturally flow from refusal to comply with it.

An order will issue directing the defendant to pay the complainant the sum of \$2,240 with interest from January 1, 1904.

10 I. C. C. REP.

INDEX.

ACT TO REGULATE COMMERCE.

CONSTRUCTION OF SECTION ONE.

- Wichita v. Missouri P. R. Co.* 35.
- Chamber of Commerce of Chattanooga v. Southern R. Co.* 111.
- Cist v. Michigan C. R. Co.* 217.
- Glade Coal Co. v. Baltimore & O. R. Co.* 226.
- Denison Light & Power Co. v. Missouri, K. & T. R. Co.* 337.
- Gardner & Clark v. Southern R. Co.* 342.
- Re Pere Marquette R. Co.* 360.
- Wrigley v. Cleveland, C. C. & St. L. R. Co.* 412.
- Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 428.
- Duluth Shingle Co. v. Duluth S. S. & A. R. Co.* 489.
- Central Yellow Pine Asso. v. Illinois C. R. Co.* 505.
- H. B. Pitts & Son v. St. Louis & S. F. R. Co.* 684.
- H. B. Pitts & Son v. Atchison, T. & S. F. R. Co.* 691.

CONSTRUCTION OF SECTION TWO.

- Re Transportation of Salt*, 148.
- Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co.* 193.
- Re Division of Joint Rates, etc.* 385.
- Wrigley v. Cleveland, C. C. & St. L. R. Co.* 412.
- Re Transportation of Coal & Mine Supplies*, 473.
- Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.
- Central Yellow Pine Asso. v. Illinois C. R. Co.* 505.
- Thompson v. Pennsylvania R. Co.* 640.

CONSTRUCTION OF SECTION THREE.

- Re Transportation of Salt from Hutchinson*, 1.
- G. C. Pratt Lumber Co. v. Chicago, I. & L. R. Co.* 29.
- Wichita v. Missouri P. R. Co.* 35.
- Parks v. Cincinnati & M. Valley R. Co.* 47.
- Railroad Commission of Kentucky v. Louisville & N. R. Co.* 173.
- Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co.* 193.
- Hewins v. New York, N. H. & H. R. Co.* 221.
- Glade Coal Co. v. Baltimore & O. R. Co.* 226.
- Gardner & Clark v. Southern R. Co.* 342.
- Paxton Tie Co. v. Detroit S. R. Co.* 422.
- Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 428.
- Mershon S. P. & Co. v. Central R. Co.* 456.
- Lehman-Higginson Grocery Co. v. Atchison, T. & S. F. R. Co.* 460.
- Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

- Central Yellow Pine Asso. v. Illinois C. R. Co.* 505.
Richmond Elevator Co. v. Pere Marquette R. Co. 629.
Thompson v. Pennsylvania R. Co. 640.

CONSTRUCTION OF SECTION FOUR.

- Chamber of Commerce of Chattanooga v. Southern R. Co.* 111.
Gardner & Clark v. Southern R. Co. 342.
Wrigley v. Cleveland, C. C. & St. L. R. Co. 412.
Lehman-Higginson Grocery Co. v. Atchison, T. & S. F. R. Co. 460.

CONSTRUCTION OF SECTION FIVE.

- Re Transportation of Immigrants from New York*, 13.
Consolidated Forwarding Co. v. Southern P. Co. 590.

CONSTRUCTION OF SECTION SIX.

- Davis v. Pere Marquette R. Co.* 405.
Parton Tie Co. v. Detroit S. R. Co. 422.
Re Transportation of Coal & Mine Supplies, 473.

CONSTRUCTION OF SECTION SEVEN.

- Railroad Commission of Kentucky v. Louisville & N. R. Co.* 173.
Hope Cotton Oil Co. v. Texas & P. R. Co. 696.

CONSTRUCTION OF SECTION EIGHT.

- Cattle Raisers' Asso. v. Chicago B. & Q. R. Co.* 83.
Davies v. Pere Marquette R. Co. 405.

CONSTRUCTION OF SECTION THIRTEEN.

- Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 423.

ADVANCES IN FREIGHT RATES.

1. While the hauling of flat cars empty to the mills, and the practice of shippers to load cars below their capacity, are conditions which, to the extent they exist, are properly taken into account by carriers in fixing rates, it must be assumed that they were considered by defendants in making and maintaining the rates so long in force prior to the advance complained of. *Tift v. Southern R. Co.* 548.

2. The rates on lumber, in force prior to the defendants' advance of 2 cents per 100 lbs. on shipments from Georgia points to Ohio River destinations, which advance was made on June 22, 1903, were reasonably high in comparison with the rates on other commodities which are at all analogous to lumber in respect to value, volume, risk, cost of handling, and other circumstances and conditions affecting the transportation of the traffic; and such advance was not warranted, and the increased rates thus in force are unreasonable and unjust. *Id.*

3. Carriers have no right to advance a rate which is already reasonably high and yields an adequate return for the service rendered, solely because additional revenue is needed. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 505; *Tift v. Southern R. Co.* 548.

4. The mere fact of the need of additional revenue to meet increased expenses does not justify the advance in rates on lumber shipments from Georgia to and beyond the Ohio River, which are, for the most part, of low grade and of comparatively small value. *Tift v. Southern R. Co.* 548.

5. Where an advance is made in rates which have been long maintained,

and the evidence shows that the traffic affected is large, important, and constantly increasing, the advance will be held unjust unless it is satisfactorily explained. *Id.*

6. The advance of rates by defendants was the result of concerted action by them and other carriers; and, while the question whether such concert of action is in violation of the anti-trust act is for the determination of the courts, it is the province and duty of this Commission, when the reasonableness of rates is in issue before it, to consider whether the advanced rates resulted from untrammelled competition, or were fixed by concert of action or combination of carriers. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 505; *Tift v. Southern R. Co.* 548.

7. The advances in freight rates by defendants were not justified by the increased cost of operating the roads, where, although the operating expenses have constantly increased, they have been enlarged by the inclusion therein of large expenditures for permanent improvements, and defendants' gross earnings have increased from year to year to such extent as to result in a constant increase of net earnings. *Id.*

8. When a railroad company advances a rate which has been for some time in force, the fact of its continuance is in the nature of an admission against that company, which tends to show the unreasonableness of the advance. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 505.

9. The rates in effect for long periods prior to the advance made by defendants of 2 cents per 100 lbs. on April 15, 1903, and the rates on lumber in car loads from points in lumber-producing territories east of the Mississippi River in Louisiana, Mississippi, and part of Alabama served by defendant roads, to Ohio River points, were remunerative to the defendant carriers, and the advance was unreasonable. *Id.*

10. If carriers are to any extent relieved from giving the notice now required, of advances and reductions in rates upon foreign commerce, they should in all cases file with the Commission the rates actually made, and give such further notice to the public as may be possible. *Re Publication & Filing of Tariffs*, 55.

AGATE WARE.

Rates on. *Chamber of Commerce of Chattanooga v. Southern R. Co.* 117.

AGRICULTURAL IMPLEMENTS.

Table showing comparison of total annual tonnage of agricultural implements with that of other commodities. *Tift v. Southern R. Co.* 568.

Central Yellow Pine Asso. v. Illinois C. R. Co. 534.

ANGLE BEADS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

ANTHRACITE COAL.

Table showing comparison of total annual tonnage of anthracite coal with that of other commodities. *Tift v. Southern R. Co.* 568.

Central Yellow Pine Asso. v. Illinois C. R. Co. 534.

ANTI-TRUST ACT.

The advance of rates by defendants was the result of concerted action by them and other carriers, and, while the question whether such concert of action is in violation of the anti-trust act is for the determination of the courts, it is the province and duty of this Commission, when the reasonableness of rates is in issue before it, to consider whether the advanced rates resulted from untrammelled competition, or were fixed by concert of action or combination of carriers. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 505; *Tift v. Southern R. Co.* 548.

ASTRAGALS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

BAKING POWDER.

Rates on. *Chamber of Commerce of Chattanooga v. Southern R. Co.* 117.

BALUSTERS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

BANANAS.

Rates on. *Gardner & Clark v. Southern R. Co.* 342.

BARLEY.

Rates on. *Cannon Falls Farmers' Elevator Co. v. Chicago G. W. R. Co.* 650.

BARREL STOCK.

Freight classification of. *Duluth Shingle Co. v. Duluth S. S. & A. R. Co.* 489.

BASE BOARDS.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

BEANS.

Rates on. *Chamber of Commerce of Chattanooga v. Southern R. Co.* 117.

BED SLATS.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

BEEF CATTLE.

Rates on. *New Orleans Live Stock Exch. v. Texas & P. R. Co.* 327.

BITUMINOUS COAL.

Table showing comparison of total annual tonnage of bituminous coal with that of other commodities. *Tift v. Southern R. Co.* 568.

Central Yellow Pine Asso. v. Illinois C. R. Co. 534.

BLINDS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

BOARDS.

Rates on. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 519.

BURDEN OF PROOF. See EVIDENCE.

BUTTERNUT LUMBER.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

CANNED GOODS.

Rates on. *Chamber of Commerce of Chattanooga v. Southern R. Co.* 111.

CAR LINE COMPANIES. See REFRIGERATOR CARS.

CARLOADS.

Carload rates, see RATES.

CARPENTERS' MOULDINGS.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

CARS.

1. The complainant was not unjustly discriminated against by failure to furnish him with cars for the shipment of grain, while supplying a competitor doing business in the same town with cars, where it appeared that complainant desired to ship grain mainly to eastern points, concerning the transportation of which an embargo had been established by eastern lines, while his competitor in that business shipped largely by defendant's line to local points for which complainant had no shipments. *Parks v. Cincinnati & M. Valley R. Co.* 47.

2. Under the conditions that attended the anthracite coal strike of 1902, and which resulted in a great demand for bituminous coal, subjecting railroad equipments to a great tax and causing congestion of lines, yards, and terminals, the defendant's temporary rule limiting its coal cars to mines having track connection with its road, thereby confining its comparatively few available cars to mines generally in operation, where quick loading could be accomplished, and declining to permit its sidings or switches to be further congested by loading coal from wagons, was calculated to hasten, rather than retard, the movement of coal for public use, and was not unreasonable or unjust. *Thompson v. Pennsylvania R. Co.* 640.

3. No opinion is expressed upon the point whether a railroad may, under ordinary conditions, discriminate in furnishing cars as between the methods of loading by tipple and wagon, or whether, without a rule, it may, even in a great emergency, discriminate between the two classes of shipments. *Id.*

4. The right of complainant to ship coal was not barred by the fact that he was a druggist by occupation, or that he loaded coal cars from wagons, for a large part of the commerce of the country is handled in that way; and when he tendered freight for transportation he was entitled to the same facilities furnished to other shippers in like conditions. *Id.*

5. Merely putting in evidence defendant's rule of car apportionment is insufficient to show discrimination against the complainant; the actual effect of the rule, during the time covered by the complaint, is necessary to a determination of the question of unfairness in the distribution of cars. *Richmond Elevator Co. v. Pere Marquette R. Co.* 629.

6. Every shipper is legally entitled to fair opportunity and treatment in the use of the carrier's utilities, and any discrimination which in a substantial degree deprives shippers of such use must be considered unjust, unless forced by justifying conditions. In such a case the burden of proof is upon the complainant for the purpose of showing discrimination, and then upon the carrier to show that the discrimination was justified. *Id.*

7. In the furnishing of cars, defendant unjustly discriminated against the complainant, which desired to ship hay from various points in Michigan, but the proof fails to indicate with any degree of certainty the damage caused by the wrongful discrimination, and the amount which the complainant was entitled to recover by way of reparation. *Id.*

8. Complainant was unjustly discriminated against by defendant's refusal to provide cars for the shipment of cross ties, while it did furnish cars to other persons for the interstate shipment of lumber, stone, and many other freight articles, and also supplied cars for the shipment of cross ties destined almost entirely for its own use. *Paxton Tie Co. v. Detroit S. R. Co.* 422.

9. Reparation awarded to complainant for defendant's refusal to furnish cars for the shipment of cross ties while it did furnish cars to other persons for the interstate shipment of lumber, stone, and many other freight articles, and also supplied cars for the shipment of cross ties destined almost entirely for its own use. *Id.*

10. While the Act to Regulate Commerce contains no provision which, expressly or by proper implication, gives this Commission jurisdiction in cases merely showing delay or negligence in the receipt, forwarding, or delivery of property offered for transportation, including the furnishing of cars, the regulating statute does prohibit any unjust discrimination or wrongful prejudice in the provision of cars or other transportation facilities, as well as in the fixing and application of transportation charges. *Richmond Elevator Co. v. Pere Marquette R. Co.* 629.

11. Making certain charges for the transportation of coal shipped in car loads when the coal is loaded by tipple, and exacting a higher charge when the coal is loaded in some other way, is unreasonable and constitutes an unjust discrimination. *Glade Coal Co. v. Baltimore & O. R. Co.* 226.

12. Defendant's refusal to furnish cars to complainants between February 25 and March 26 on the Deal side track at Meyersdale and the side

track of the Savage Brick Company, at Keystone Junction, while furnishing and offering to furnish cars to complainants' competitors at other points, under the circumstances disclosed by the evidence and described in the findings, was undue and unlawful discrimination against complainants, for which they are entitled to reparation. *Id.*

CARTRIDGES.

Rates on. *Chamber of Commerce of Chattanooga v. Southern R. Co.* 118.

CASES CITED.

Allen v. L. N. A. & C. R. Co. 1 I. C. C. Rep. 199,—cited on p. 34.

Allowances to Elevators by Union P. R. Co., Re, 10 I. C. C. Rep. 309,—cited on p. 399.

A. T. & S. F. Ry. Co., Re, 7 I. C. C. 240,—cited on p. 660.

Board of Trade of Chattanooga v. East Tennessee, V. & G. R. Co. 5 I. C. C. Rep. 546, 4 Inters. Com. Rep. 213,—cited on p. 112.

Board of Trade of Lynchburg v. Old Dominion S. S. Co. 6 I. C. C. Rep. 633,—cited on pp. 98, 350.

Butchers' & Drovers' Stock Yards Co. v. Louisville & N. R. Co. 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed. 35,—cited on pp. 186, 189.

Carr v. Northern Pacific Railway Company, 9 I. C. C. Rep. 1,—cited on p. 251.

Cartage case, See INTERSTATE COMMERCE COMMISSION v. DETROIT, G. H. & M. R. Co.

Cattle Raisers' Association of Texas v. Fort Worth & Denver City Railway Company et al. 7 I. C. C. Rep. 513,—cited on p. 447.

Central Stock Yards Co. v. Louisville & N. R. Co. 55 C. C. A. 63, 118 Fed. 113,—cited on p. 192.

Central Stock Yards Co. v. Louisville & N. R. Co. 112 Fed. 823,—cited on p. 191.

Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339,—cited on p. 374.

Central Yellow Pine Association v. Illinois Central Railroad Company et al. 10 I. C. C. Rep. 505,—cited on pp. 579, 582.

Central Yellow Pine Association v. Vicksburg, Shreveport & Pacific Railroad Co. 10 I. C. C. Rep. 193,—cited on pp. 399, 545, 546.

Charges for the Transportation and Refrigeration of Fruit Shipped from Points in Michigan on the Pere Marquette and Michigan Central Railroads, Matter of, 10 I. C. C. Rep. 360,—cited on p. 615.

Chicago Board of Trade v. Chicago & Alton R. Co. et al. 4 I. C. C. Rep. 158,—cited on p. 430, 452.

Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722,—cited on p. 225.

Consolidated Forwarding Co. v. Southern P. Co. 9 I. C. C. Rep. 182,—cited on p. 615.

Copp v. Louisville & N. R. Co. 50 Fed. 164,—cited on p. 100.

- Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U. S. 596, 597, 41 L. ed. 566, 17 Sup. Ct. Rep. 198,—cited on p. 585.
- Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461,—cited on p. 185.
- Crews v. Richmond & D. R. Co.* 1 I. C. C. Rep. 401, 1 Inters. Com. Rep. 703,—cited on p. 213.
- Danville v. Southern Railway Co.* 8 I. C. C. Rep. 409,—cited on p. 344.
- Denaby Main Colliery Co. v. Manchester, Sheffield & Lincolnshire Railway Co. L. R.* 11 App. Cas. 97,—cited on pp. 209, 350.
- Diamond Mills v. B. & M. R. R.* 9 I. C. C. Rep. 311,—cited on p. 681.
- Divisions of Joint Rates and Other Allowances to Terminal Railroads, Matter of*, 10 I. C. C. Rep. 385,—cited on p. 673.
- Duncan v. Atchison, T. & S. F. Ry. Co. et al.* 6 I. C. C. Rep. 85,—cited on p. 225.
- East Tennessee, Va. & Ga. Railway v. Interstate Commerce Commission*, 39 C. C. A. 422, 99 Fed. Rep. 61,—cited on pp. 541, 580.
- East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516,—cited on pp. 109, 134, 472.
- Export & Domestic Rates, Re*, 8 I. C. C. Rep. 214,—cited on p. 63.
- Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628,—cited on p. 374.
- Georgia Peach Growers' Association v. Atlantic Coast Line Railroad Co.* 10 I. C. C. Rep. 255,—cited on p. 621.
- Glade Coal Company Case*, 10 I. C. C. Rep. 226,—cited on p. 647.
- Guild v. Hale*, 15 Mass. 455,—cited on p. 104.
- Harp Case*, 118 Fed. 169,—cited on p. 647.
- Harp v. Choctaw, O. & G. Ry. Co.* 118 Fed. 169,—cited on p. 245.
- H. H. Tift v. Southern Railway Company et al.* 123 Fed. Rep. 789,—cited on p. 555.
- Holmes v. Southern Ry. Co.* 8 I. C. C. Rep. 568,—cited on pp. 535, 542.
- Import Rate Case*,—cited on p. 63.
- Independent Refiners' Asso. v. Western New York & P. R. Co.* 6 I. C. C. Rep. 378,—cited on p. 98.
- Interstate Commerce Commission v. Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563,—cited on p. 401.
- Interstate Commerce Commission v. Chicago, B. & Q. R. Co.* 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. Rep. 824,—cited on p. 88.
- Interstate Commerce Commission v. Clyde S. S. Co. et al.* 181 U. S. 29, 45 L. ed. 729, 21 Sup. Ct. Rep. 512,—cited on p. 109.
- Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.* 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. Rep. 986,—cited on p. 205.
- Interstate Commerce Commission v. Southern Pacific Co. et al.* 123 Fed. Rep. 597,—cited on p. 592.
- Interstate Commerce Commission v. Southern Pacific Co. et al.* 132 Fed. 829,—cited on pp. 578, 592, 615.
- Joint Traffic Association Case*, 171 U. S. 569, 571, 577, 43 L. ed. 287, 288, 290, 19 Sup. Ct. Rep. 25,—cited on pp. 541, 580.

Kauffman Milling Company v. Missouri Pacific Railway Company, 4 I. C. C. Rep. 417, 3 Inters. Com. Rep. 400,—cited on pp. 36, 37, 38, 40, 45.

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Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209,—cited on p. 109.

Louisville & N. R. Co., Petition of, 1 I. C. C. Rep. 31, 1 Inters. Com. Rep. 279,—cited on p. 250.

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New Orleans Cotton Exchange v. Louisville, N. O. & T. R. Co. 4 I. C. C. Rep. 694, 3 Inters. Com. Rep. 523,—cited on p. 63.

New York Produce Exchange v. New York C. & H. R. R. Co. 3 I. C. C. Rep. 137, 2 Inters. Com. Rep. 553,—cited on p. 63.

Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 465,—cited on p. 188.

Paine Brothers & Company v. Lehigh Valley Railroad Company et al. 7 I. C. C. Rep. 218,—cited on p. 251.

Pullman Palace Car Co. v. Missouri P. R. Co. 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194,—cited on p. 374.

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Railroad Commission v. Louisville & N. R. Co. 10 I. C. C. Rep. 173,—cited on p. 374.

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Ratican v. Terminal R. Asso. 114 Fed. 666,—cited on p. 100.

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Smyth v. Ames (Nebraska Freight Rate Case) 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418,—cited on pp. 538, 539, 585.

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Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666,—cited on pp. 65, 110.

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Truck Farmers' Case, 6 I. C. C. Rep. 295,—cited on p. 376.

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Johnston-Larimer D. Co. v. Atchison, T. & S. F. R. Co. 6 I. C. C. Rep. 586,—cited on pp. 462, 472.

CASINGS.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

CATTLE.

Rates on. *Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 428.

CEDAR LUMBER.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

CEDAR POLES.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

CEDAR POSTS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

CEDAR SHINGLES.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

CEMENT.

Table showing car capacity and actual loading weight of car loaded with cement and other commodities. *Tift v. Southern R. Co.* 577.

Central Yellow Pine Asso. v. Illinois C. R. Co. 533.

Table showing comparison of total annual tonnage of cement with that of other commodities. *Tift v. Southern R. Co.* 568.

Central Yellow Pine Asso. v. Illinois C. R. Co. 534.

CHERRY LUMBER.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

CHEWING GUM.

Rates on. *Wrigley v. Cleveland, C. C. & St. L. R. Co.* 412.

CLOSET FITTINGS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

CLOSET SEATS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

CLOSET TANKS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

COAL.

Table showing car capacity and actual loading capacity when loaded with coal as compared with other commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 533.

Tift v. Southern R. Co. 577.

Rates on. *Glade Coal Co. v. Baltimore & O. R. Co.* 226.

Denison Light & Power Co. v. Missouri, K. & T. R. Co. 337.

Re Transportation of Coal & Mine Supplies, 473.

COFFEE, GREEN.

Rates on. *Chamber of Commerce of Chattanooga v. Southern R. Co.* 117.

COFFEE, ROASTED.

Rates on. *Chamber of Commerce of Chattanooga v. Southern R. Co.* 117.

COMBINATIONS.

The advance of rates by defendants was the result of concerted action by them and other carriers, and, while the question whether such concert of action is in violation of the anti-trust act is for the determination of the courts, it is the province and duty of this Commission, when the reasonableness of rates is in issue before it, to consider whether the advanced rates resulted from untrammelled competition, or were fixed by concert of action or combination of carriers. *Central Yellow Pine Asso. v. Illinois O. R. Co.* 505; *Tift v. Southern R. Co.* 548.

COMBINATION TO PREVENT CONTINUOUS CARRIAGE.

A railroad company does not violate the Act to Regulate Commerce, in making and carrying out an exclusive contract with a stock yards company for the exclusive delivery to that company of live stock in the city of Louisville, although in carrying out such contract it refuses to deliver to another railroad company, for delivery to a competing stock yards, live stock consigned to such competing stock yards. *Railroad Commission of Kentucky v. Louisville & N. R. Co.* 173.

COMPETITION. See also WATER COMPETITION.

1. Applying the law as construed by the United States Supreme Court,

the traffic from New York and other eastern points is carried to Nashville through Chattanooga under substantially different circumstances and conditions from those pertaining to traffic from the same points to Chattanooga, the short distance, and consequently the higher rate to Chattanooga is not unlawful under section four of the statute. *Chamber of Commerce of Chattanooga v. Southern R. Co.* 111.

2. The rates from New York and other eastern points to Chattanooga are not shown to be unreasonable within the meaning of section one of the Act, although they are higher than the rates from the same points through Chattanooga to Nashville, the longer distance, as the traffic from New York and other eastern points is carried to Nashville through Chattanooga under substantially different circumstances and conditions. *Id.*

3. The rates from Cannon Falls, a point in Minnesota 48 miles from Minneapolis, to Chicago, East St. Louis, and Louisville, are competitive rates, as are also the rates from Minneapolis; and Cannon Falls, with its competition with Minneapolis, is entitled to as low a rate to common points as the difference in conditions will permit. In view, however, of the desirability of keeping open the Minneapolis market to Cannon Falls grain, the short distance between those points, and the low rate from Minneapolis forced by competition, it is apparently not unjust that the grain rate from Cannon Falls should be as high as the local rate to Minneapolis plus a 7½ cent rate therefrom to Chicago, provided the Cannon Falls dealer is not thereby subjected to disadvantage as compared with the Minneapolis grain dealer. *Cannon Falls Farmers' Elevator Co. v. Chicago G. W. R. Co.* 650.

4. The favorable location of Cannon Falls with reference to Minneapolis and Duluth, and the competitive advantage to which the Cannon Falls dealer is entitled by reason of the route *via* Duluth, are neutralized to an extent by manipulation of billing at Minneapolis, whereby Cannon Falls grain sold in Minneapolis can be reconsigned to Duluth under a substituted billing and the balance of a through rate, resulting in a less total charge from Cannon Falls to Duluth than the charge on a through shipment from Cannon Falls to Duluth. *Id.*

5. The combination of rates on rye and other coarse grain from Cannon Falls to Minneapolis and thence to Chicago is ½ cent less than the straight rate from Cannon Falls to Chicago, which is without justification. *Id.*

6. The Mobile & Ohio Railroad Company is justified in making a lower rate of charges from St. Louis, Mo., East St. Louis, and Cairo, Ill., to Mobile, Ala., and Meridian, Miss., than for the shorter distances to Tupelo, Aberdeen, Columbus, West Point, and Starkville, Miss., by actual and controlling competition which creates substantial dissimilarity in the circumstances and conditions affecting transportation. *Aberdeen Group Commercial Assn. v. Mobile & O. R. Co.* 289.

7. Defendant has had in force since April 25, 1903, rates per 100 lbs. on bananas in earloads from Charleston, S. C., which are 43 cents to Danville, Va., and 35½ cents to Lynchburg, Va., the transportation to the latter point by defendant's line being through Danville. The lower rate to Lynchburg is forced upon defendant by the competition of bananas coming

from Baltimore. The 43-cent rate to Danville is not found to be unreasonable, and upon these facts the higher rate to Danville is not in violation of the Act to Regulate Commerce. *Gardner & Clark v. Southern R. Co.* 342.

CONFLICT OF LAWS.

While the regulating statute may be applied to the reasonableness of a rate from a point in Canada to a point in the United States, it is clear that no law of the United States can apply to a discrimination between places in a foreign country. *Cist v. Michigan C. R. Co.* 217.

CONNECTING CARRIERS.

See also heading *Through Rates*, under title **RATES**.

1. A railroad company does not violate the Act to Regulate Commerce in making and carrying out an exclusive contract with a stock yards company for the exclusive delivery to that company of live stock in the city of Louisville, although in carrying out such contract it refuses to deliver to another railroad company, for delivery to a competing stock yards, live stock consigned to such competing stock yards. *Railroad Commission of Kentucky v. Louisville & N. R. Co.* 173.

2. The Act to regulate commerce does not confer upon the Commission authority to make an order affirmatively requiring a railway carrier to deliver carloads of interstate freight to a connecting carrier. *Id.*

CONTINUOUS CARRIAGE. See also COMBINATION TO PREVENT CONTINUOUS CARRIAGE.

1. While defendant carrier was entitled to insist upon the application of the through rate to the through shipment on its line to Hope, Ark., instead of applying the sum of local rates based upon Texarkana, Ark., which sum was less than the published through charge, it could not lawfully refuse to receive and carry complainant's freight to Texarkana under the local rate to that point, even though the complainant's attempt to ship its freight to Texarkana was for the purpose of having it subsequently re-shipped from that point by another line to Hope, Ark. *Hope Cotton Oil Co. v. Texas & P. R. Co.* 696.

2. The complainant is entitled to reparation for damages resulting from its inability to ship 640 tons of cotton seed to Hope, which it had contracted for and desired to have transported over defendant's line to Texarkana, and then by way of another line to Hope, and which shipment defendant had refused to accept under its local rate to Texarkana, but attempted to compel the complainant to pay the through rate to Hope, which was higher than the local rates based upon Texarkana, Ark. *Id.*

CORN.

Rates on. *Swoffield v. Atlantic Coast Line R. Co.* 281.

H. B. Pitts & Son v. St. Louis & S. F. R. Co. 684.

CORNICE BRACKETS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

CORN MEAL.

Rates on. *Aberdeen Group Commercial Asso. v. Mobile & O. R. Co.* 289.

COTTON.

Table showing comparison of total annual tonnage of cotton with that of other commodities. *Tift v. Southern R. Co.* 568.

COTTON SEED.

Rates on. *Hope Cotton Oil Co. v. Texas & P. R. Co.* 696.

COTTON SEED HULLS.

Table showing car capacity and actual loading capacity when loaded with cotton seed hulls as compared with other commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 533. *Tift v. Southern R. Co.* 577.

COTTON SEED MEAL.

Table showing car capacity and actual loading capacity when loaded with cotton seed meal as compared with other commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 533; *Tift v. Southern R. Co.* 577.

COWPEAS.

Not to be classified with fertilizer in the adjustment of freight rates. *Swaffield v. Atlantic Coast Line R. Co.* 281.

CYPRESS LUMBER.

Table showing car capacity and actual loading capacity when loaded with cypress lumber as compared with other lumbers and commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 533; *Tift v. Southern R. Co.* 577.

CYPRESS SHINGLES.

Table showing car capacity and actual loading capacity when loaded with cypress shingles as compared with other lumbers and commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 533; *Tift v. Southern R. Co.* 577.

DAMAGES. See also REPARATION.

The Act to Regulate Commerce clearly confers authority upon the Commission to award damages in cases brought before it; and as such award is simply a recommendation, which can only be enforced by a suit at law affording full opportunity for a jury trial, the Act in this respect is, in the opinion of the Commission, constitutional and valid. *Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co.* 83.

DEPOTS. See FREIGHT DEPOT.

DIFFERENTIALS.

Validity of maintenance of rates on flour from points in Kansas and

Missouri to points in Texas, which are 5 cents per 100 lbs. higher than those on wheat, where such differential is not applied on flour or wheat carried in any other direction. *Wichita v. Missouri P. R. Co.* 35.

DISCRIMINATION. See also REBATES.

1. A railroad company does not violate to Act to Regulate Commerce by making and carrying out an exclusive contract with a stock yards company, by which it delivers all live stock transported by it to the yards of such stock yards company. *Railroad Commission of Kentucky v. Louisville & N. R. Co.* 173.

2. A railroad company may provide refrigerator cars by purchase or by lease; and if the latter plan is adopted, it may make contracts with one company which exclude the use of cars owned by other companies. *Re Transportation of Fruit*, 360.

3. No undue preference between individuals or localities is made by the failure or refusal of defendants to make "tap line" allowances to mill owners in their territory, which lies east of the Mississippi, while such allowances are granted to mill owners by other carriers in the territory west of the Mississippi. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 505.

4. Reparation awarded to complainant for defendant's refusal to furnish cars for the shipment of cross ties, while it did furnish cars to other persons for the interstate shipment of lumber, stone, and many other freight articles, and also supplied cars for the shipment of cross ties destined almost entirely for its own use. *Paxton Tie Co. v. Detroit S. R. Co.* 422.

5. In supplying competitor with private switch, and denying like facility to complainant. *Parks v. Cincinnati & M. Valley R. Co.* 47.

Between shippers. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 505.

Re Transportation of Coal & Mine Supplies, 473.

Glade Coal Co. v. Baltimore & O. R. Co. 226.

Re Transportation of Salt from Hutchinson, 1.

Re Division of Joint Rates, etc. 661.

Koch v. Pennsylvania R. Co. 675.

Chicago Live Stock Exchange v. Chicago G. W. R. Co. 428.

Wrigley v. Clercland, C. C. & St. L. R. Co. 412.

Re Division of Joint Rates, etc. 385.

Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co. 193.

Re Allowance of Elevators, 309.

Re Transportation of Salt, 148.

Re Transportation of Immigrants from New York, 13.

See also heading *Discrimination between Shippers*, under title RATES.

Between places. *Lehman Higgins Grocery Co. v. Atchison, T. & S. F. R. Co.* 460.

Gardner & Clark v. Southern R. Co. 342.

Mershon S. P. & Co. v. Central R. Co. 456.

Duluth Shingle Co. v. Duluth, S. S. & A. R. Co. 489.

Chamber of Commerce of Chattanooga v. Southern R. Co. 111.

Re Transportation of Salt, 148.

Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co. 193.

Re Transportation of Immigrants from New York, 13.

G. C. Pratt Lumber Co. v. Chicago, I. & L. R. Co. 29.

Wichita v. Missouri, P. R. Co. 35.

Cannon Falls Farmers' Elevator Co. v. Chicago, G. W. R. Co. 650.

Koch v. Pennsylvania R. Co. 675.

Chicago Live Stock Exchange v. Chicago G. W. R. Co. 428.

Chamber of Commerce v. Baltimore & O. S. W. R. Co. 378.

See also heading *Discrimination between Places* under title **RATES**.

6. By regulation of carrier providing for earlier closing hour of freight depots at one place than at other competing points. *Cincinnati Chamber of Commerce and Merchants' Exchange v. Baltimore & O. S. W. R. Co.* 378.

Between commodities. *Duluth Shingle Co. v. Duluth S. S. & A. R. Co.* 489.

Cannon Falls Farmers' Elevator Co. v. Chicago, G. W. R. Co. 650.

Chicago Live Stock Exchange v. Chicago G. W. R. Co. 428.

See also heading *Discrimination between Commodities*, under title **RATES**.

7. It is not an unlawful discrimination between commodities, for the defendant railroad company to deliver carloads of dead freight to the Southern Railway for consignees in Louisville, and to refuse to deliver live stock to the same railway at Louisville, consigned to a particular stock yards, where the defendant railroad company is under a contract with a competing stock yards company to deliver all live stock to such company. *Railroad Commission of Kentucky v. Louisville & N. R. Co.* 173.

Between passengers. *Hevins v. New York, N. H. & H. R. Co.* 221.

In furnishing cars. *Richmond Elevator Co. v. Pere Marquette R. Co.* 629.

Thompson v. Pennsylvania R. Co. 640.

Parks v. Cincinnati & M. Valley R. Co. 47.

Glade Coal Co. v. Baltimore & O. R. Co. 226.

See also **CARS**.

DISMISSAL.

1. As to defendant carrier where it appears that such defendant does not participate in the rates in question. *Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 428.

2. As to defendant carrier where it appears that such carrier has removed the discrimination complained of, as to its lines. *Id.*

WITHOUT PREJUDICE.

3. Where the existing disadvantage to Cincinnati, arising from the early closing hour of the freight depot situated there, is not under present circumstances unreasonable or undue, but may become so if continued indefinitely. *Cincinnati Chamber of Commerce and Merchants' Exchange v. Baltimore & O. S. W. R. Co.* 378.

DIVISION OF RATES.

See heading *Through Rates—Division of Rates*, under title, **RATES**.

DOOR FRAMES.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

DOORS.

Freight classification of. *Duluth Shingle Co. v. Duluth S. S. & A. R. Co.* 489.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

DOORS, SCREEN.

Rates on. *Duluth Shingle Co. v. Duluth S. S. & A. R. Co.* 489.

DRAWBACKS. See REBATES.

DRESSED MEATS.

Rates on. *Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 423.

EARTHENWARE.

Rates on. *Chamber of Commerce of Chattanooga v. Southern R. Co.* 117, 118.

ELEVATORS.

As to Rebates in General, see REBATES.

1. A railroad company may perform elevator or transfer service for itself, or, if it sees fit, hire it done by others, and in so doing is not legally at fault or guilty of wrongdoing because those employed by the carrier to transfer the grain are also shippers of grain, and are thereby incidentally aided in their business of buying and shipping grain. *Matter of Allowances to Elevators*, 309.

2. A carrier cannot complain because of a reasonable allowance made by a rival carrier for elevator or transfer service. *Id.*

3. One and one-fourth cents per 100 lbs. of grain, paid by a carrier for elevator or transfer service, is not unreasonable. *Id.*

EMBARGO.

The complainant was not unjustly discriminated against by failure to furnish him with cars for the shipment of grain, while supplying a competitor doing business in the same town with cars, where it appeared that complainant desired to ship grain mainly to eastern points, concerning the transportation of which an embargo had been established by eastern lines, while his competitor in that business shipped largely by defendant's line to local points for which complainant had no shipment. *Parks v. Cincinnati & M. Valley R. Co.* 47.

ESTOPPEL. See JUDGMENT.

EVIDENCE.

1. The value of the entire property of a road can shed but little, if any,
10 I. C. C. REP.—46.

light upon the question whether the rate on one among thousands of articles of traffic yields its proper proportion of a fair return upon that value; and, moreover, the voluminous and conflicting testimony in this case on that subject does not enable the Commission to determine the value of defendants' respective properties. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 505.

2. Merely putting in evidence defendant's rule of car apportionment is insufficient to show discrimination against the complainant; the actual effect of the rule, during the time covered by the complaint is necessary to a determination of the question of unfairness in the distribution of cars. *Richmond Elevator Co. v. Pere Marquette R. Co.* 629.

3. Every shipper is legally entitled to fair opportunity and treatment in the use of the carrier's utilities, and any discrimination which in a substantial degree deprives shippers of such use must be considered unjust, unless forced by justifying conditions. In such a case the burden of proof is upon the complainant for the purpose of showing discrimination, and then upon the carrier to show that the discrimination was justified. *Id.*

FACILITIES. See also CARS.

1. The right of complainant to ship coal was not barred by the fact that he was a druggist by occupation, or that he loaded coal cars from wagons, for a large part of the commerce of the country is handled in that way; and when he tendered freight for transportation he was entitled to the same facilities furnished to other shippers in like conditions. *Thompson v. Pennsylvania R. Co.* 640.

2. While the Act to regulate commerce contains no provision which, expressly or by proper implication, gives this Commission jurisdiction in cases merely showing delay or negligence in the receipt, forwarding, or delivery of property offered for transportation, including the furnishing of cars, the regulating statute does prohibit any unjust discrimination or wrongful prejudice in the provision of cars or other transportation facilities, as well as in the fixing and application of transportation charges. *Richmond Elevator Co. v. Pere Marquette R. Co.* 629.

3. No such undue preference or unjust discrimination as would warrant an order of relief or for reparation is shown under complainant's claim that he was subjected to an unreasonable disadvantage by refusing him a private switch and providing his competitor in the coal business with one, thereby compelling him to unload coal at an inconvenient point near the outskirts of the town, where it appeared that complainant really desired to use a passing siding of defendant for the purpose of unloading his coal. *Parks v. Cincinnati & M. Valley R. Co.* 47.

FENCE POSTS.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

FENCING.

Rates on. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 519.

FERTILIZER.

Cowpeas not to be classified with, in the adjustment of freight rates. *Swaffield v. Atlantic Coast Line R. Co.* 281.

Table showing car capacity and actual loading capacity when loaded with fertilizer as compared with other commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 533; *Tift v. Southern R. Co.* 577.

FLOORING.

Rates on. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 519.

FLOUR.

Rates on. *Wichita v. Missouri P. R. Co.* 35; *Aberdeen Group Commercial Asso. v. Mobile & O. R. Co.* 289.

Table showing comparison of total annual tonnage of flour with that of other commodities. *Tift v. Southern R. Co.* 568.

FREIGHT DEPOT.

1. A railroad freight depot and a public storage warehouse are not used for similar purposes, and the charge for storage in the railroad depot may properly be made higher than the public warehouse charge, with the object of compelling the expeditious removal of freight. *Blackman v. Southern R. Co.* 352.

2. The Southern Railway Company in applying to complainant's interstate traffic at Macon, Ga., the storage rates prescribed by the Georgia Railroad Commission, and the Columbia, Newberry, and Laurens Railroad Company, in applying to complainant's interstate traffic at Columbia, S. C., the storage rates prescribed by the South Carolina Railroad Commission, did not violate the Act to Regulate Commerce, although such storage rates were in excess of the usual public warehouse charges in Macon and Columbia. *Id.*

3. The regulation providing for an earlier closing hour of the freight depot at Cincinnati than that which has previously been in force, and which is earlier than that in force at other points, does not, under the existing conditions and circumstances, impose upon the shippers of Cincinnati unreasonable or undue disadvantage in competing with shippers at other points, but it may do so if continued indefinitely; and the dismissal of the complaint is, therefore, without prejudice to further proceedings. *Cincinnati Chamber of Commerce and Merchants' Exchange v. Baltimore & O. S. W. R. Co.* 378.

4. The Commission is authorized by the Act to Regulate Commerce, after investigation, to order carriers to cease and desist from subjecting any particular person, locality, or description of traffic to undue or unreasonable prejudice or disadvantage in any respect whatsoever; and its jurisdiction extends to a case of alleged unlawful prejudice and disadvantage to shippers of outbound package freight through enforcement by carriers of a regulation providing for the earlier closing of depots used for the reception of such freight. *Id.*

5. Storage rates and regulations enforced by common carriers subject to

the Act to Regulate Commerce must be published at their stations and filed with the Commission. *Blackman v. Southern R. Co.* 352.

FRESH MEATS.

Rates on. *Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 428.

FRUIT.

Rates on. *Re Transportation of Fruit*, 360.

FRUIT AND VEGETABLE PACKAGES MADE FROM WOOD.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

FRUIT AND VEGETABLES.

Table showing comparison of total annual tonnage of fruit and vegetables with that of other commodities. *Tift v. Southern R. Co.* 563; *Central Yellow Pine Asso. v. Illinois C. R. Co.* 534.

FURNITURE.

Table showing car capacity and actual loading capacity when loaded with furniture as compared with other commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 533; *Tift v. Southern R. Co.* 577.

GABLE ORNAMENTS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

GRAIN.

Table showing total annual freight tonnage of grain and other commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 534; *Tift v. Southern R. Co.* 568.

Rates on. *Aberdeen Group Commercial Asso. v. Mobile & O. R. Co.* 289; *Cannon Falls Farmers' Elevator Co. v. Chicago, G. W. R. Co.* 650.

GRILLE WORK.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

HAY.

Furnishing of Cars for Transportation of, see CARS.

Rates on. *H. B. Pitts & Son v. Atchison, T. & S. F. R. Co.* 691.

Table showing comparison of total annual tonnage of hay with that of other commodities. *Tift v. Southern R. Co.* 568.

HOGS.

Rates on. *Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 428.

HOLLOW WARE.

Rates on. *Chamber of Commerce of Chattanooga v. Southern R. Co.* 118.

HOOPS.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

HORSES.

Rates on. *Barrow v. Yasoo & M. V. R. Co.* 333.

HOUSEHOLD GOODS.

Table showing total annual freight tonnage of household goods and other commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 534; *Tift v. Southern R. Co.* 568.

HUBS.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

ICING. See REFRIGERATOR CARS.

IMMIGRANTS.

It is at least doubtful whether section five of the Act to regulate commerce, and which forbids the pooling of freights, applies to a practice whereby the transportation of immigrants from Atlantic ports westward is divided between the carriers in agreed proportions based upon the proportion of the domestic passenger traffic, done by each line, where such a practice cannot be made effective in respect to any other class of passenger business, and the immigrants are carried at domestic published rates, and the arrangements adopted by the carriers in connection with the immigration authorities of the United States have efficiently promoted the protection and greatly improved the treatment and comfort of immigrants. *Re Transportation of Immigrants from New York*, 13.

INJUNCTION.

The Atchison, Topeka, & Santa Fe Railway Company has systematically and continuously violated the act of February 19, 1903 (the so-called "Elkins law"), notwithstanding that it has, in a suit begun in the United States Supreme Court at the instance and request of this Commission, been under injunction since March 25, 1902, to observe in all respects its published schedules of rates. *Re Transportation of Coal & Mine Supplies*, 473.

INTERIOR TRIMMINGS, WOOD.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

INTERSTATE COMMERCE COMMISSION.

1. Where a proceeding as to the legality of a transaction was merely one of inquiry, the Commission contented itself with expressing an opinion, and did not make an order in the premises. *Re Transportation of Salt from Hutchinson*, 1.

2. It is the province of the Commission to interfere and secure, if pos-

sible, a fair adjustment in cases of unreasonable rates or unjust discrimination; but the Commission has no more authority to place competing millers in different states upon precisely the same footing than it has to equalize conditions in all localities and in every industry. *Wichita v. Missouri P. R. Co.* 35.

3. Complainant was granted leave to apply within a limited time for a further hearing, where its proof failed to indicate with any degree of certainty the damage caused by the wrongful discrimination, and the amount which it was entitled to recover by way of reparation. *Richmond Elevator Co. v. Pere Marquette R. Co.* 629.

4. The investigation into the division of joint rates and other allowances of terminal railroads being one in which no specific charges had been formulated against particular defendants, no order was made. *Re Division of Rates, etc.* 385.

5. The Commission is authorized by the Act to regulate commerce, after investigation, to order carriers to cease and desist from subjecting any particular person, locality, or description of traffic to undue or unreasonable prejudice or disadvantage in any respect whatsoever, and its jurisdiction extends to a case of alleged unlawful prejudice and disadvantage to shippers of outbound package freight through enforcement by carriers of a regulation providing for the earlier closing of depots used for the reception of such freight. *Cincinnati Chamber of Commerce and Merchants' Exchange v. Baltimore & O. S. W. R. Co.* 378.

6. Where a party elects to proceed before this Commission for the recovery of damages, his petition filed with the Commission should be considered the beginning of the action in all its subsequent stages; consequently the suit of the members of a cattle raisers' association for the recovery of damages should be treated as having been begun by the filing on their behalf of the original petition by the association itself, although they subsequently intervened. *Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co.* 83.

7. The Commission has no power to grant redress for the failure of a carrier to comply with its common-law duty to furnish refrigerator cars. *Re Transportation of Fruit*, 360.

8. Where the record was not sufficiently definite to enable the Commission to make an order for reparation, it held the case open to enable the complainant to present further testimony upon that branch of the case. *Denison Light & Power Co. v. Missouri, K. & T. R. Co.* 337.

9. While the Commission found as a fact that the charges of defendant were in some instances unreasonable, it made no attempt to formulate an order, as it had no power to prescribe the rate that should be put into effect; but it held that complainant might apply to it for reparation in case it should thereafter be compelled to pay rates in excess of those indicated. *Barrow v. Yazoo & M. V. R. Co.* 333.

10. While an association of shippers has no direct interest in the determination of the question as to whether divisions or allowances from published tariff rates, made by defendants to tap lines owned or controlled by other shippers, constitute departures from the published rates, it has such an indirect interest as entitles it, under the statute, to maintain a proceed-

ing to have such division declared unlawful. *Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co.* 193.

11. The Act to regulate commerce does not confer upon the Commission authority to make an order affirmatively requiring a railway carrier to deliver carloads of interstate freight to a connecting carrier. *Railroad Commission of Kentucky v. Louisville & N. R. Co.* 173.

12. The Commission has no regulating authority beyond that conferred by the terms of the Act to Regulate Commerce, and its jurisdiction does not extend to enforcing provisions in a state Constitution. *Id.*

13. The effect of an advance in through rates after the Supreme Court had dismissed a proceeding to have certain terminal charges declared unjust and unlawful, which dismissal was upon the ground that there had been a reduction in the through rate greater than the terminal charge, cannot be determined, in a proceeding in the same suit for reparation, as regards territory to which the reduction in the through rate did not apply, but is a matter for independent inquiry in a new proceeding. *Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co.* 83.

14. A decision of the Supreme Court sustaining the view of the Commission as to the illegality of certain terminal charges, but dismissing the proceeding on account of a subsequent reduction in the through rate, which had been made from certain territory, which reduction amounted to more than the terminal charges involved; and authorizing the Commission to commence proceedings to correct any unreasonableness in the rate resulting from the additional terminal charge as to any territory to which the reduction referred to did not apply,—does not estop the Commission from further proceeding and investigation as to the legality of a terminal charge for the future, without the institution of a new proceeding, as the Commission is not *functus officio*; and the mere use by the Supreme Court in its decree of the word “commencing,” with reference to further proceedings, is not construed to require the formal institution of a new proceeding. The case will therefore stand reopened for further investigation and order, with leave to complainant to show to what territory the through rate reduction applied. *Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co.* 83.

15. In determining the question of reparation, in a suit to declare a terminal charge excessive and unlawful, where the question of reparation was held open pending determination of another branch of the case, during which time a reduction in the through rate was made from certain territory, which reduction amounted to more than the terminal charge, the following procedure was directed by the Commission: Damages to be allowed on shipments from all territory down to the date of the reduction in the through rates, and, from territory to which that reduction did not apply, down to the date of the hearing; but it was directed that those damages accruing before and those accruing after the original order of the Commission holding the terminal charge unlawful and unjust be shown separately, with leave to defendants to show any change in the conditions since the date of the order of the Commission, which would render the entire through rate, including the terminal charge, a reasonable one. *Id.*

16. The Act to Regulate Commerce clearly confers authority upon the

Commission to award damages in cases brought before it, and as such award is simply a recommendation, which can only be enforced by a suit at law affording full opportunity for a jury trial, the Act in this respect is, in the opinion of the Commission, constitutional and valid. *Id.*

17. The decision of the Supreme Court sustaining the view of the Commission as to the unlawfulness and excessiveness of a terminal charge, but dismissing the proceeding on account of a subsequent reduction in the through rate, which amounted to more than the terminal charge, constitutes no bar to submission of proof before the Commission upon the question of reparation, covering the period elapsing prior to the reduction in the through rate referred to, which question had been properly held over by the Commission pending determination of the other branch of the case. *Id.*

18. Although the allegations concerning reparation, contained in the original petition asking the Commission to order the defendants to desist from imposing an unreasonable and unjust terminal charge, are plainly sufficient to constitute the basis for an award of damages, the defendants are entitled, before the hearing, to a specification showing in detail the amounts for which recovery is sought. *Id.*

INTERVENTION.

Whatever may be said of the right or status of shippers generally as to reparation for damages resulting from a rate or charge declared by the Commission to be unlawful, the Cattle Raisers' Association of Texas is entitled in this case to show damages to its members, and upon such showing the Commission will order reparation; but in view of the unsettled state of the law in this respect, and in order that all phases of the question may be presented to the court, the members of the association seeking damages should file claims in the nature of intervening petitions. *Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co.* 83.

IRON.

Table showing total annual freight tonnage of iron and other commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 534; *Tift v. Southern R. Co.* 568.

IRON AND STEEL RAILS.

Table showing total annual freight tonnage of iron and steel rails and other commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 534; *Tift v. Southern R. Co.* 568.

JOINT RATES.

See heading *Through Rates*, under title *RATES*.

JOISTS.

Rates on. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 519.

JUDGMENT.

1. A decision of the Supreme Court sustaining the view of the Commis-

sion as to the illegality of certain terminal charges, but dismissing the proceeding on account of a subsequent reduction in the through rate, which had been made from certain territory, and which reduction amounted to more than the terminal charges involved, and authorizing the Commission to commence proceedings to correct any unreasonableness in the rate resulting from the additional terminal charge, as to any territory to which the reduction referred to did not apply,—does not estop the Commission from further proceeding and investigation as to the legality of a terminal charge for the future, without the institution of a new proceeding, as the Commission is not *functus officio*; and the mere use by the Supreme Court in its decree of the word “commencing,” with reference to further proceedings, is not construed to require the formal institution of a new proceeding. The case will, therefore, stand reopened for further investigation and order, with leave to complainant to show to what territory the through rate reduction applied. *Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co.* 83.

2. Neither does it constitute a bar to submission of proof before the Commission upon the question of reparation, covering the period elapsing prior to the reduction in the through rate referred to, which question had been properly held open by the Commission pending determination of the other branch of the case. *Id.*

LATH.

Freight classification of. *Duluth Shingle Co. v. Duluth S. S. & A. R. Co.* 489.

LEMONS.

Rates on. *Consolidated Forwarding Co. v. Southern P. Co.* 590.

LIME.

Table showing car capacity and actual loading capacity when loaded with lime as compared with other commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 533; *Tift v. Southern R. Co.* 577.

LIMITATION OF ACTIONS.

Where a party elects to proceed before this Commission for the recovery of damages, his petition filed with the Commission should be considered the beginning of the action in all its subsequent stages; consequently the suit of the members of a cattle raisers' association for the recovery of damages should be treated as having been begun by the filing on their behalf of the original petition by the association itself, although they subsequently intervened. *Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co.* 83.

LIVE STOCK.

Table showing car capacity and actual loading capacity of car loaded with live stock as compared with other commodities. *Tift v. Southern R. Co.* 577; *Central Yellow Pine Asso. v. Illinois C. R. Co.* 533.

Table showing total annual freight tonnage of live stock and other commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 534.

Rates on. *Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 428.

LOGS.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

LONG AND SHORT HAUL PROVISION.

See heading *Long and Short Haul*, under the title **RATES**.

Aberdeen Group Commercial Asso. v. Mobile & O. R. Co. 289.

Gardner & Clark v. Southern R. Co. 342.

Chamber of Commerce of Chattanooga v. Southern R. Co. 111.

G. C. Pratt Lumber Co. v. Chicago, I. & L. R. Co. 29.

LUMBER.

Table showing total annual freight tonnage of lumber and other commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 534.

Tift v. Southern R. Co. 568.

Rates on. *G. C. Pratt Lumber Co. v. Chicago, I. & L. R. Co.* 29.

Duluth Shingle Co. v. Duluth, S. S. & A. R. Co. 489.

Mershon S. P. & Co. v. Central R. Co. 456.

Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co. 193.

Central Yellow Pine Asso. v. Illinois C. R. Co. 505.

Tift v. Southern R. Co. 548.

MAHOGANY LUMBER.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

MEATS.

Rates on. *Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 428.

MILLING IN TRANSIT.

1. Considering the defendants as a single line, the granting of transit milling west of Pittsburg and denying it to millers at Harrisburg is not necessarily unlawful, because conditions on that line in Ohio and Indiana may be very different from conditions in eastern Pennsylvania; but such differences have not been shown, nor their bearing explained, and upon the meager and incomplete facts now appearing, the Commission is not warranted in making a decision which in principle, if complainant's contention is well founded, would involve a general extension of transit privileges into a large territory where heretofore such privileges have not been allowed. *Koch v. Pennsylvania R. Co.* 675.

2. Shippers are not entitled, as a matter of fact, to mill grain in transit and forward the milled product under the through rate in force on the grain from the point of origin to the place of ultimate destination; but allowance of the privilege by a carrier to shippers in one section must be

without wrongful prejudice to the rights of shippers in another section served by its line. *Id.*

3. The transportation of the log to the mill by one line, and the transportation of the lumber from the mill by another line, may, under the circumstances of this case, be treated as in the nature of a through shipment from the point where the log is received to the point where the lumber is finally delivered; and the carrier of the lumber may, by joint arrangement with the log carrier, make such allowance toward the cost of moving the log as would be fairly involved in moving the lumber from the point where the log is received for carriage, provided always that the carrier of the log is a common carrier by rail; but this holding extends the application of the principle of milling in transit to the extreme limit. *Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co.* 193.

4. Treating the transportation of the log to the mill by one line, and the transportation of the lumber from the mill by another line, as a through shipment, involves the right to mill in transit; and, when that privilege is granted, the tariff should show upon its face that the transportation covers carriage of the log to and the lumber from the mill, and the division allowed to the carrier of the log should be named in all cases. *Id.*

MONOPOLY.

A railroad company does not violate the Act to Regulate Commerce by making and carrying out an exclusive contract with a stock yards company by which it delivers all live stock transported by it to the yards of such stock company. *Railroad Commission of Kentucky v. Louisville & N. R. Co.* 173.

MULES.

Rates on. *Barrow v. Yazoo & M. V. R. Co.* 333.

NOTICE.

The provisions of § 6 of the Act to Regulate Commerce are not complied with by posting a notice stating that tariffs may be inspected upon application to the carrier's agent. *Paxton Tie Co. v. Detroit S. R. Co.* 422.

OAK LUMBER.

Table showing car capacity and actual loading capacity when loaded with oak lumber as compared with other lumbers and commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 533.

Tift v. Southern R. Co. 577.

OATS.

Rates on. *Aberdeen Group Commercial Asso. v. Mobile & O. R. Co.* 289.

OFFENSES.

The defendants are not shown to be guilty of any wilful or intentional violation of the law, where it was charged that they imposed charges in

excess of the tariff rate on certain shipments of fruit from Michigan points to Chicago, but the facts showed the existence of errors in charges arising from lack of knowledge by the Chicago agent of the kind of package used, or the actual contents of the package shipped to complainant, the shipments having been unloaded by complainant, and that such errors also arose from a practice of the agent of the initial carrier at one point temporarily used as a receiving station for fruit, of making a charge in addition to the freight rate, without the knowledge of the railroad company. *Davis v. Pere Marquette R. Co.* 405.

ORANGES.

Rates on. *Consolidated Forwarding Co. v. Southern P. Co.* 590.

PACKING HOUSE PRODUCTS.

Rates on. *Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 428.

Table showing total annual freight tonnage of packing house products and other commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 534.

PANEL JAMBS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

PANEL WAINSCOTING AND CEILING.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

PANTRY FITTINGS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

PARLOR CARS.

1. It is not a violation of law to charge a higher parlor car rate in one direction on certain trains than is charged in the other direction on all trains between the same points, provided the carrier furnishes adequate parlor car accommodations at the lower rates. *Hewins v. New York, N. H. & H. R. Co.* 221.

2. A discrimination against passengers by reason of charging on three of defendants' trains a parlor car rate higher than the regular rate is not undue or unreasonable, where the defendants run numerous trains daily on which parlor car seats may be had at the lower rates. *Id.*

PARTIES.

1. An incorporated association whose members are engaged in the purchase, shipment, and sale of live stock has the right, under section thirteen of the Act to Regulate Commerce, to institute and maintain a proceeding to have live stock rates declared unreasonable, even though the purpose of the organization is to restrain, limit, and destroy competition in trade. *Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 428.

2. In proceedings to determine the reasonableness of a through rate as augmented by an alleged unlawful terminal charge, all the carriers participating in the through rate are proper parties, but not necessary parties,

as the only necessary parties defendant, are the carriers who retain the terminal charge for their own use. *Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co.* 83.

3. While an association of shippers has no direct interest in a determination of the question as to whether divisions or allowances from published tariff rates, made by defendants to tap lines owned or controlled by other shippers, constitute departures from the published rates, it has such an indirect interest as entitles it, under the statute, to maintain a proceeding to have such division declared unlawful. *Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co.* 193.

4. The complainants are entitled to bring and maintain a proceeding on behalf of themselves and in the interest of all shippers of the traffic involved, to have an advance in freight rates declared unlawful, notwithstanding their membership in an unlawful trade association, as, in the first place, the complainants constitute but a small portion of the membership of the association, and, in the second place, such a proceeding is not a strictly private or personal suit into which a party complainant must enter with "clean hands," but is a proceeding for the enforcement of a public duty, as well as of an individual or private right. *Tift v. Southern R. Co.* 548.

PAVING BLOCKS.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

PEACHES.

Rates on. *Georgia Peach Growers' Asso. v. Atlantic Coast Line R. Co.* 255.

Re Transportation of Fruit, 360.

PERISHABLE FRUIT.

Upon all the facts and circumstances, including, on the one hand, the difficulties and liability to loss attending the production and shipment of peaches, and, on the other hand, the large percentage of cars loaded above the prescribed minimum weights for carloads, for which excess no charge is made by the carriers, the exceptional character of the service, which involves fast time and prompt delivery at destination, the carriage of a large amount of nonpaying freight, return of cars without loads, and many other conditions relating to the highly perishable nature of the traffic,—*Held*, that neither the minimum carload weight, nor the transportation charge established by the defendants engaged in the carriage of peaches in refrigerator cars from Georgia points to New York, based upon the rate of 81 cents from Atlanta to New York, is unreasonable or unjust. *Georgia Peach Growers' Asso. v. Atlantic Coast Line R. Co.* 255.

PETITION. See PLEADING.

PICKETS.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

PILASTERS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

PILES.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

PLEADING.

Although the allegations concerning reparation contained in the original petition asking the Commission to order the defendants to desist from imposing an unreasonable and unjust terminal charge are plainly sufficient to constitute the basis for an award of damages, the defendants are entitled, before the hearing, to a specification showing in detail the amounts for which recovery is sought. *Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co.* 83.

PLOW BEAMS.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

PLOW HANDLES.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

POOLING AGREEMENTS.

1. Defendants are unlawfully engaged in pooling the traffic in citrus fruits originating in Southern California and carried by them and their connections to eastern markets; but further action upon this branch of the proceeding is reserved by the Commission, in view of the pendency, in the United States Supreme Court, of an appeal from a like decision of the circuit court for the southern district of California, in a suit brought by this Commission to enforce its order herein prohibiting the defendants from continuing to apply and enforce a provision in their tariff reserving to themselves the routing of this traffic to eastern destinations, and depriving the shippers of their right to determine which of various established routes shall be used for the transportation of their property. *Consolidated Forwarding Co. v. Southern P. Co.* 590.

2. It is at least doubtful whether section five of the Act to Regulate Commerce, which forbids the pooling of freights, applies to a practice whereby the transportation of immigrants from Atlantic ports westward is divided between the carriers in agreed proportions based upon the proportion of the domestic passenger traffic done by each line, where such a practice cannot be made effective in respect to any other class of pas-

senger business, and the immigrants are carried at domestic published rates, and the arrangements adopted by the carriers in connection with the immigration authorities of the United States have efficiently promoted the protection and greatly improved the treatment and comfort of immigrants. *Re Transportation of Immigrants from New York*, 13.

PORCH COLUMNS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

PORCH NEWELS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

PORCH RAILINGS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

PORTIERE WORK.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

POSTING NOTICE.

The provisions of section six of the Act to Regulate Commerce are not complied with by posting a notice stating that tariffs may be inspected upon application to the carrier's agent. *Paston Tie Co. v. Detroit S. R. Co.* 422.

RATES.

Advance in, see **ADVANCE IN FREIGHT RATES.**

1. Whether or not the regulating statute applies to refrigeration charges in all cases, the defendants, by compelling shippers to pay icing charges on citrus fruits as established by the car lines, or do without necessary refrigeration for the traffic, have made these charges part of the cost of transportation and subject to regulation under the law. *Consolidated Forwarding Co. v. Southern P. Co.* 590.

2. Where a railroad company makes a reduction from regular passenger fares which are not found unreasonable, it may lawfully require that a person desiring to avail himself of such reduction shall purchase a ticket, and that all persons not holding such special reduced rate ticket shall pay the reasonable ordinary fare. *Cist v. Michigan C. R. Co.* 217.

3. When charges for refrigeration are applied in the transportation of perishable freight, such charges should be published and adhered to exactly as all other charges for transportation are published and observed. The same considerations of justice and public policy, which require this in case of the freight rate, apply to the charge for refrigeration. *Re Transportation of Fruit*, 360.

CARLOAD RATES.

4. Upon all the facts and circumstances, including, on the one hand, the difficulties and liability to loss attending the production and shipment of peaches, and, on the other hand, the large percentage of cars loaded above

the prescribed minimum weights for carloads, for which excess no charge is made by the carriers, the exceptional character of the service, which involves fast time and prompt delivery at destination, the carriage of a large amount of nonpaying freight, return of cars without loads, and many other conditions relating to the highly perishable nature of the traffic.—*Held*, that neither the minimum carload weight nor the transportation charge established by the defendants engaged in the carriage of peaches in refrigerator cars from Georgia points to New York, based upon a rate of 81 cents from Atlanta to New York, is unreasonable or unjust. *Georgia Peach Growers' Asso. v. Atlantic Coast Line R. Co.* 255.

5. Defendant's rate of \$1.25 per 100 lbs. on oranges in carloads carried from southern California to points on and east of the Missouri River is unreasonable and unjust. *Consolidated Forwarding Co. v. Southern P. Co.* 590.

6. Defendants' minimum carload weight of 26,000 lbs. for the carriage of citrus fruit in refrigerator or ventilator cars from southern California points to eastern destinations is not unreasonable, with the 40-foot car in general use. *Id.*

7. Defendants' present rate of \$1.00 per 100 lbs. on lemons in carloads from southern California to points on and east of the Missouri River is apparently reasonable. *Id.*

8. The Texas & Pacific Railway Company's rate on beef cattle in carloads from Ft. Worth Tex., to New Orleans, La., is 42½ cents per 100 lbs., and \$15 per car additional when shipment is made in lots of less than ten carloads. Upon complaint against the imposition of the additional \$15 per car,—*Held*, that the charge of \$15 per car in addition to the rate of 42½ cents per 100 lbs. is unreasonable when applied to single carload shipments. *New Orleans Live Stock Exch. v. Texas & P. R. Co.* 327.

COMPETITION.

9. No undue discrimination results to Sheridan by reason of the fact that the rate from that place to Boston is 2 cents per 100 lbs. more than from Indianapolis to Boston, although the latter is the longer-distance point by the defendant's line, which runs north from Indianapolis through Sheridan, connecting at various points with lines to Boston; as Indianapolis is a competitive point, and the short lines from Sheridan to the east are through Indianapolis, and by those lines Sheridan is a longer-distance point. *G. C. Pratt Lumber Co. v. Chicago, I. & L. R. Co.* 29.

DIFFERENTIALS.

10. There has been no such change in conditions governing the traffic as to warrant the Commission in interfering with its previous holding, whereby it declared that there was nothing unlawful in the fact that the rates from points in Kansas and in Missouri to points in Texas are 5 cents per 100 lbs. higher on flour than on wheat, and that such differential is not applied on flour or wheat carried in any other direction. *Wichita v. Missouri P. R. Co.* 35.

DISCRIMINATION BETWEEN COMMODITIES.

11. The defendants, by charging a higher rate on shingles than on lumber in carloads from Duluth, Minn., to Chicago, Ill., unjustly discriminated against shingles in favor of lumber. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

12. The rate on rye, barley, and other coarse grain from Cannon Falls to Louisville or East St. Louis is wrongfully higher than the rate on wheat between the same points. *Cannon Falls Farmers' Elevator Co. v. Chicago G. W. R. Co.* 650.

13. The traffic in cattle and hogs in Chicago and other points is discriminated against by the exaction of higher rates for transporting cattle and hogs than for transporting live stock products to Chicago from points west, northwest, and southwest thereof, including Missouri River points and South St. Paul, Minnesota. *Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 428.

14. The desire of a carrier to secure additional business does not justify a change in the relation of rates, resulting in a higher rate upon cattle and hogs, the raw material, than upon live stock product, the manufactured article, where, as in this case, the articles are in sharp competition with each other in markets of purchase and sale, where it appears that upon other lines and in other sections rates are generally no higher, and in many instances much lower, on the traffic prejudiced than on that favored by the change, and where numerous and important industries, which have been built up and maintained under the former adjustment, and those interested in such industries, will be injuriously affected by the action taken. *Id.*

DISCRIMINATION BETWEEN PASSENGERS.

15. It is not a violation of law to charge a higher parlor car rate in one direction on certain trains than is charged in the other direction on all trains between the same points, provided the carrier furnishes adequate parlor car accommodations at the lower rates. *Hewins v. New York, N. H. & H. R. Co.* 221.

16. A discrimination against passengers by reason of charging on three of defendants' trains a parlor car rate higher than the regular parlor car rate is not undue or unreasonable, where the defendants run numerous trains daily on which parlor car seats may be had at the lower rates. *Id.*

DISCRIMINATION BETWEEN PLACES.

17. The rule laid down in *Johnston-Larimer D. Co. v. Atchison, T. & S. F. R. Co.* 6 I. C. C. Rep. 586, forbidding any higher charge to Wichita than to Kansas City on shipments from Galveston, is, in the light of the decisions of the United States Supreme Court, no longer applicable; and defendants operating lines through Wichita to Kansas City are not prohibited from charging a higher rate to Wichita than to Kansas City, so
10 I. C. C. REP.—47.

long as the Wichita rate is reasonable. *Lehman-Higginson Grocery Co. v. Atchison, T. & S. F. R. Co.* 460.

18. The competitive conditions applying in the transportation of sugar to Wichita and Kansas City do not justify the 15 cent differential against Wichita; such differential should not be more than 8 cents per 100 lbs. *Id.*

19. Prior to April 25, 1903, defendant had in effect rates per 100 lbs. on bananas in carloads from Charleston, which were 43 cents to Danville and 20 cents to Lynchburg. The rate of 20 cents to Lynchburg was 13 cents below the rate which was justified by competition from Baltimore or elsewhere. Such relation of rates was in violation of section three of the Act to regulate commerce. *Gardner & Clark v. Southern R. Co.* 342.

20. An undue discrimination is made by the defendants in fixing their rates for transporting lumber to points on the New York & Long Branch Railroad by adding to the rate to New York city an arbitrary charge of 5 cents per 100 lbs. when the shipping point is Saginaw, Mich., but only 2 cents per 100 lbs. when the shipping point is Buffalo, N. Y. Water competition between Buffalo and New York affects the rates to New York, but it justifies no wider difference in the rates from Saginaw and Buffalo to these interior destinations than exists in the rates from these shipping points to New York. *Mershon S. P. & Co. v. Central R. Co.* 456.

21. The defendants by charging a higher rate on shingles than on lumber in carloads from Duluth, Minn., to Chicago, Ill., subject Duluth and its shingle shippers to undue prejudice and disadvantage, and afford undue preference and advantage to other places from which shingles are carried at rates as low as those applied on lumber therefrom. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

22. The rates from New York and other eastern points to Chattanooga are not shown to be unreasonable within the meaning of section one of the Act, although they are higher than the rates from the same points through Chattanooga to Nashville, the longer distance, as the traffic from New York and other eastern points is carried to Nashville and Chattanooga under substantially different circumstances and conditions. *Chamber of Commerce of Chattanooga v. Southern R. Co.* 111.

23. Applying the law as construed by the United States Supreme Court, the traffic from New York and other eastern points is carried to Nashville through Chattanooga under substantially different circumstances and conditions than those pertaining to traffic from the same points to Chattanooga, the short distance, and consequently the higher rate to Chattanooga is not unlawful under section four of the statute. *Id.*

24. The share of the through rate for the transportation of salt from producing points in Michigan to points on the Missouri River, which is allowed to the boat line on Lake Michigan, the controlling interest in which is owned by the same persons who own a controlling interest in the corporations producing salt at the point named, and which share amounts to from 30 to 33½ per cent of the through rate, and is considerably higher than the former charge for carrying salt on Lake Michigan, but which increase is partly accounted for by the fact that additional services are included,—is not so grossly disproportionate to the value of

the additional through services as to amount to a rebate in favor of the salt interests which control the boat line. *Re Transportation of Salt*, 148.

25. It is no part of the duty of the Commission to equalize differences in the natural advantages of localities through the adjustment of tariff rates. *Id.*

26. No unlawful discrimination against localities is made by defendants in the granting of divisions in the rates to lumber mills owning or controlling short originating roads called "tap lines," while other carriers fail or refuse to allow like concessions to members of the complaining association located in a different section of the country. *Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co.* 193.

27. There is no discrimination against localities by an arrangement among carriers dividing the traffic of transporting immigrants from Atlantic ports westward in agreed proportions, where the immigrants are transported at domestic published rates. *Re Transportation of Immigrants from New York*, 13.

28. No undue discrimination results to Sheridan by reason of the fact that the rate from that place to Boston is 2 cents per 100 lbs. more than from Indianapolis to Boston, although the latter is the longer distance point by the defendant's line, which runs north from Indianapolis through Sheridan, connecting at various points with lines to Boston; as Indianapolis is a competitive point, and the short lines from Sheridan to the east are through Indianapolis, and by those lines Sheridan is a longer distance point. *G. C. Pratt Lumber Co. v. Chicago I. & L. R. Co.* 29.

29. It is the province of the Commission to interfere and secure, if possible, a fair adjustment in cases of unreasonable rates or unjust discrimination; but the Commission has no more authority to place competing millers in different states upon precisely the same footing than it has to equalize conditions in all localities and in every industry. *Wichita v. Missouri P. R. Co.* 35.

30. There has been no such change in conditions governing the traffic as to warrant the Commission in interfering with its previous holding, whereby it declared that there was nothing unlawful in the fact that the rates from points in Kansas and in Missouri to points in Texas are 5 cents per 100 lbs. higher on flour than on wheat, and that such differential is not applied on flour or wheat carried in any other direction. *Id.*

31. The combination of rates on rye and other coarse grain from Cannon Falls to Minneapolis and thence to Chicago is $\frac{1}{2}$ cent less than the straight rate from Cannon Falls to Chicago, which is without justification. *Cannon Falls Farmers' Elevator Co. v. Chicago G. W. R. Co.* 650.

32. The rates from Cannon Falls, a point in Minnesota 48 miles from Minneapolis, to Chicago, East St. Louis, and Louisville, are competitive rates, as are also the rates from Minneapolis. And Cannon Falls, with its competition with Minneapolis, is entitled to as low a rate to common points as the difference in conditions will permit. In view, however, of the desirability of keeping open the Minneapolis market to Cannon Falls grain, the short distance between those points, and the low rate from Minneapolis forced by competition, it is apparently not unjust that the

grain rate from Cannon Falls should be as high as the local rate to Minneapolis plus a 15-cent rate therefrom to Chicago, provided the Cannon Falls dealer is not thereby subjected to disadvantage as compared with the Minneapolis grain dealer. *Id.*

43. The favorable location of Cannon Falls with reference to Minneapolis and Duluth, and the competitive advantage to which the Cannon Falls dealer is entitled by reason of the route via Duluth, are neutralized to an extent by manipulation of billing at Minneapolis, whereby Cannon Falls grain sold in Minneapolis can be retransigned to Duluth under a substituted billing and the balance of a through rate, resulting in a less total charge from Cannon Falls to Duluth than the charge on a through shipment from Cannon Falls to Duluth. *Id.*

44. A ruling that in interstate haul to one locality and no previous transportation to a competing locality, substitute justification for a lower charge from the former to a common market, would be in effect to approve the equalization of natural advantages and disadvantages as between localities, and such equalization is not sanctioned by the Act to Regulate Commerce. *Id.*

45. The traffic in cattle and hogs in Chicago and other points is discriminated against by the exaction of higher rates for transporting cattle and hogs than for transporting live stock products to Chicago from points west, northwest, and southwest thereof, including Missouri River points and South St. Paul, Minnesota. *Chicago Live Stock Exchange v. Chicago C. & N. W. R. Co.* 429.

46. Shippers are not entitled, as a matter of fact, to mill grain in transit, and forward the milled product under the through rate or freight on the grain from the point of origin to the place of ultimate destination, but allowance of the privilege by a carrier to shippers in one section must be without wrongful prejudice to the rights of shippers in another section served by its line. *Koch v. Pennsylvania R. Co.* 473.

47. Considering the defendants as a single line, the granting of transit milling west of Pittsburg and haying it to millers at Harrisburg is not necessarily unlawful, because conditions on that line in Ohio and Indiana may be very different from conditions in eastern Pennsylvania; but such differences have not been shown, nor their bearing explained, and upon the meager and incomplete facts now appearing the Commission is not warranted in making a decision which in principle, if complainant's contention is well founded, would involve a general extension of transit privileges into a large territory where heretofore such privileges have not been allowed. *Id.*

DISCRIMINATION BETWEEN SHIPPERS.

48. The logging roads, or "trap lines," to which the defendant, the Mobile & Ohio Railroad Company, grants allowances from its published rates, are not common carriers, but such trap lines are the private property of mill owners, and the allowances are therefore unlawful. *Central Yellow Pine Assoc. v. Illinois C. R. Co.* 505.

49. The Atchafalaya, Tipton & Santa Fe Railway Company grossly and con-

tinuously violated the Act to Regulate Commerce in the following respects: It published rates on interstate shipments of coal from mines in Colorado and New Mexico, which, under the tariffs, applied only to the transportation thereof, but which for the Colorado Fuel & Iron Company were made by the railway company to include the price of the coal, and such price was paid to the Fuel & Iron Company by the railway company. While giving rebates to the Fuel & Iron Company from such tariff rates, it charged the full tariff rates on interstate shipments of coal by other shippers, in not only the general coal region involved, but in the same coal field; which practice of the railway company resulted in closing markets for coal to shippers competing with the Colorado Fuel & Iron Company. *Re Transportation of Coal & Mine Supplies*, 473.

40. Making certain charges for the transportation of coal shipped in carloads when the coal is loaded by tipple, and exacting a higher charge when it is loaded in some other way, is not justified by difference in cost to the carrier between different methods of loading, and renders the higher rates thus made unduly discriminatory, first, as against complainants, and, second, as against all other shippers of coal except those who load by tipple. *Glade Coal Co. v. Baltimore & O. R. Co.* 226.

41. The act of February 19, 1905 (the so-called "Elkins law"), which applies both to the carrier and the party receiving the concession, has been systematically and continuously violated by the Atchison, Topeka & Santa Fé Railway Company and the Colorado Fuel & Iron Company from the day of its passage down to November 27, 1904, when the tariffs upon which this coal moved were reduced in all cases \$1.15. *Re Transportation of Coal & Mine Supplies*, 473.

42. A division of a freight rate with another railroad company constitutes a mere subterfuge to give a concession in the rate, and is unlawful, where the railroad company receiving the division of the rate, while owning four or five thousand feet of railway siding adjoining one of several plants belonging to the shipper, does not own any equipment or rolling stock, and is not in any way engaged as a common carrier, but is in fact controlled by the officers of the shipping company, who control its earnings and receive the benefit of the division of the rate, thereby enabling it to sell its produce at prices which its competitors cannot meet. *Re Transportation of Salt from Hutchinson*, 1.

43. In holding that an allowance of compensation to a shipper by the carrier for transferring his shipment from East St. Louis to the carrier's St. Louis depot, where similar compensation was denied other carriers, was illegal, no opinion was expressed as to whether lines leading west from St. Louis may properly apply the St. Louis rate to the station of a bona fide transfer company in East St. Louis and absorb the cost of transfer to St. Louis; neither was any opinion expressed as to whether the rail carriers may, by proper schedules, allow all shippers from East St. Louis a fixed sum per 100 lbs. for transporting their merchandise to the carrier's depots in St. Louis, those questions not being presented by the record in the same proceeding. *Re Division of Joint Rates*, etc. 661.

44. Carriers operating lines to points west of the Mississippi River make

rates to such points, which are the same from East St. Louis, Ill., as from St. Louis, Mo. Most of the freight is carried from East St. Louis to the St. Louis depots by transfer companies, who receive from the carriers 5 cents per 100 lbs. for such transfer. The Grant Chemical Company, a shipper, receives a like sum for a similar transfer by it of its shipments to East St. Louis, which payment is refused to other shippers. The Eclipse Transfer Company was organized for the sole purpose of obtaining this payment; it uses teams owned by the Simmons Hardware Company, and uses the storehouse of the latter for a receiving depot. These payments to the Grant Chemical Company and the Eclipse Transfer Company are illegal. *Id.*

45. Shippers are not entitled, as a matter of fact, to mill grain in transit and forward the milled product under the through rate in force on the grain from the point of origin to the place of ultimate destination; but allowance of the privilege by a carrier to shippers in one section must be without wrongful prejudice to the rights of shippers in another section served by its line. *Koch v. Pennsylvania R. Co.* 675.

46. The Granite City, Alton & Eastern Railroad Company was organized for the purpose of operating several thousand feet of railway used in the business of the St. Louis Syrup & Preserving Company and located on the latter's private grounds at Granite City, Ill. The Granite City company has constructed a short track outside the limits of the grounds of the Preserving Company, and uses, jointly with other companies, another track about 3,000 feet in length. By means of these tracks the Granite City company connects with other railroad companies, and is paid by the latter certain divisions of transportation charges on traffic shipped by the preserving company and hauled to such connections by the Granite City company. Assuming that the Granite City company and the Preserving company are identical in ownership, concerning which a definite finding is not made,—*Held*, that the payments to the Granite City company constitute rebates, and are illegal. *Re Division of Joint Rates*, 661.

47. The Illinois Terminal Railway Company receives an excessively large share on the division of the through rate on goods transported over it to the Illinois Glass Company, which concession is illegal, provided the glass company owns and operates the Illinois terminal railway; but a different question may be presented if it appears that the holders of the capital stock of the glass company own the railroad company. *Id.*

48. The shippers of cattle and hogs are unduly discriminated against by the exaction of higher rates for transporting cattle and hogs than for transporting live stock products to Chicago from points west, northwest, and southwest thereof, including Missouri River points and South St. Paul, Minnesota; as such discrimination is not justified by differences in cost of transportation or otherwise. *Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 428.

49. Defendant's rule, providing that the minimum charge upon any single shipment of freight shall be for 100 pounds at the class or commodity rate applying upon the article, which is in force in the territory roughly described as south of the Ohio and Potomac and east of the Mississippi rivers,

and also on traffic shipped to that territory from points in the central west, does not, upon the facts of the case, unjustly discriminate in its application to complainant's traffic. *Wrigley v. Cleveland, C. C. & St. L. R. Co.* 412.

50. An unlawful preference to the United States Steel Corporation, which owns and controls the Illinois Steel Company, is practised under a division of rates whereby the Chicago, Lake Shore, & Eastern Railway Company—a terminal road owned by the United States Steel Corporation, and operated between the Illinois Steel Company's works—obtains a grossly excessive division for the service rendered. *Re Division of Joint Rates, etc.* 385.

51. Where excessive divisions of rates are granted by the carrier to another carrier owned and controlled by a shipper, for the purpose of obtaining the traffic of that shipper, they benefit the shipper and operate as a rebate or other device to cut the tariff charge, in violation of the Act to regulate commerce. *Id.*

52. An unlawful preference in favor of the International-Harvester Company is practised by means of the division of the through rate, under which division the Illinois Northern Railroad Company, owned by such Harvester Company, and the Chicago, West Pullman, & Southern Railroad Company, controlled by it, receive a percentage of the rate, which amounts to about \$12 per car, for services which were formerly performed by these terminal roads as a switching charge, and which amounted to a maximum of \$3.50 per car, which was reasonable for these services. *Id.*

53. Defendants publish a certain rate on lumber from stations upon their lines, which must be strictly observed and charged to all shippers alike; and they are not entitled, under the Act to Regulate Commerce, to grant a division of the rate to the owner of a lumber mill as compensation to him for the cost of bringing his logs to the mill by steam railroad, horse railroad, wagon, or any other means of conveyance. *Central Yellow Pine Asso. v. Vicksburg S. & P. R. Co.* 193.

54. The construction of grain elevators by a shipper, and the allowance by the carrier of $1\frac{1}{4}$ cents per 100 lbs. for elevator or transfer services to the corporations controlled by the shipper and which conduct the elevators, does not amount to a rebate. *Re Allowance to Elevators*, 309.

55. While there may be great objections to allowing shippers to build and operate railroads over which their traffic moves, such action is not prohibited by the Act to Regulate Commerce; and the mere fact that the property of a common carrier is owned by the largest individual shipper over it, or that it was originally constructed for the purpose of doing the work of that shipper, furnishes no reason why it cannot make joint rates and agree upon joint divisions with other railroads. *Re Division of Joint Rates*, 385.

56. The second section of the Act to Regulate Commerce, which prohibits its rebates whereby one shipper is preferred to another, refers to a like and contemporaneous service performed under similar circumstances and conditions; and, in the absence of a showing of such similarity of circumstances and conditions, such section is not violated by the granting of

divisions of rates to lumber mills owning or controlling short originating roads, while other carriers fail or refuse to allow like concessions to complainants located in a different section of the country. *Central Yellow Pine Asso. v. Vicksburg S. & P. R. Co.* 193.

57. The share of the through rate for the transportation of salt from producing points in Michigan to points on the Missouri River, which is allowed to the boat line on Lake Michigan, the controlling interest in which is owned by the same persons who own a controlling interest in the corporations producing salt at the point named, and which share amounts to from 30 to 33½ per cent of the through rate, and is considerably higher than the former charge of carrying salt on Lake Michigan, but which increase is partly accounted for by the fact that additional services are included,—is not so grossly disproportionate to the value of the additional through service as to amount to a rebate in favor of the salt interests which control the boat line. *Re Transportation of Salt*, 148.

58. A division of a freight rate with another railroad company constitutes a mere subterfuge to give a concession in the rate, and is unlawful, where the railroad company receiving the division of the rate, while owning four or five thousand feet of railway siding adjoining one of several plants belonging to the shipper, does not own any equipment or rolling stock, and is not in any way engaged as a common carrier, but is in fact controlled by the officers of the shipping company, who control its earnings and receive the benefit of the division of the rate, thereby enabling it to sell its produce at prices which its competitors cannot meet. *Re Transportation of Salt from Hutchinson Kansas*, 1.

59. The allowance by a carrier to an elevator company which it has procured to construct elevators, of 1½ cents per 100 lbs. as an elevator or transfer charge, does not amount to a discrimination in favor of grain shippers who own and control the elevator company. *Matter of Allowances to Elevators*, 309.

60. There is no discrimination against individuals by an arrangement among carriers dividing the traffic of transporting immigrants from Atlantic ports westward in agreed proportions, where the immigrants are transported at domestic published rates. *Re Transportation of Immigrants from New York*, 13.

61. No undue discrimination against individuals is made in the granting of divisions in rates to lumber mills owning or controlling short originating roads called "tap lines," while other carriers fail or refuse to allow like concessions to members of the complaining association located in a different section of the country. *Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co.* 193.

LONG AND SHORT HAUL.

62. The Mobile & Ohio Railroad Company is justified in making a lower rate of charges from St. Louis, Mo., East St. Louis, and Cairo, Ill., to Mobile, Ala., and Meridian, Miss., than for the shorter distances to Tupelo, Aberdeen, Columbus, West Point, and Starkville, Miss., by actual and controlling competition which creates substantial dissimilarity in the circum-

stances and conditions affecting transportation. *Aberdeen Group Commercial Asso. v. Mobile & O. R. Co.* 289.

63. Prior to April 25, 1903, defendant had in effect rates per 100 lbs. on bananas in carloads from Charleston, which were 43 cents to Danville and 20 cents to Lynchburg. The rate of 20 cents to Lynchburg was 13 cents below the rate which was justified by competition from Baltimore or elsewhere. Such relation of rates was in violation of section four of the Act to regulate commerce. *Gardner & Clark v. Southern R. Co.* 342.

64. Applying the law as construed by the United States Supreme Court, the traffic from New York and other eastern points is carried to Nashville through Chattanooga under substantially different circumstances and conditions from those pertaining to traffic from the same points to Chattanooga, the shorter distance; and consequently a higher rate to Chattanooga is not unlawful under section four of the statute. *Chamber of Commerce of Chattanooga v. Southern R. Co.* 111.

65. No undue discrimination results to Sheridan by reason of the fact that the rate from that place to Boston is 2 cents per 100 lbs. more than from Indianapolis to Boston, although the latter is the longer distance point by the defendant's line, which runs north from Indianapolis through Sheridan, connecting at various points with lines to Boston; as Indianapolis is a competitive point, and the short lines from Sheridan to the east are through Indianapolis, and by those lines Sheridan is a longer distance point. *G. C. Pratt Lumber Co. v. Chicago, I. & L. R. Co.* 29.

OFFENSES.

66. The defendants were not shown to be guilty of any wilful or intentional violation of the law, where it was charged that they imposed charges in excess of the tariff rate on certain shipments of fruit from Michigan points to Chicago, and the facts showed the existence of errors in charges arising from lack of knowledge by the Chicago agent of the kind of package used, or the actual contents of the package shipped to complainant, the shipments having been unloaded by complainant, and that such errors also arose from a practice of the agent of the initial carrier at one point temporarily used as a receiving station for fruit, of making a charge in addition to the freight rate, without the knowledge of the railroad company. *Davis v. Pere Marquette R. Co.* 405.

POOLING OF FREIGHTS.

67. It is at least doubtful whether section five of the Act to Regulate Commerce, which forbids the pooling of freights, applies to a practice whereby the transportation of immigrants from Atlantic ports westward is divided between the carriers in agreed proportions based upon the proportion of the domestic passenger traffic done by each line, where such a practice cannot be made effective in respect to any other class of passenger business, and the immigrants are carried at domestic published rates, and the arrangements adopted by the carriers in connection with the immigration authorities of the United States have efficiently promoted the protection and greatly improved the treatment and

comfort of immigrants. *Re Transportation of Immigrants from New York*, 13.

PROPORTIONAL RATES.

68. The proportional rates per 100 lbs. charged by the Atchison, Topeka, and Santa Fé Railway Company on shipments of hay over its road and the road of the Texas & Pacific Railway Company, from Robinson and La Junta, Colo., and Dodge City, Kan., to Marshall, Jefferson, and Kildare, Tex., were excessive and unreasonable to the extent that they exceeded 21 cents for the transportation to Ft. Worth, Tex.; and those of the Texas & P. Co. were excessive and unreasonable to the extent that they exceeded 15 cents for the transportation from Ft. Worth to the destinations named. *H. B. Pitts & Son v. Atchison, T. & S. F. R. Co.* 691.

REASONABLENESS OF.

69. The desire of a carrier to secure additional business does not justify a change in the relation of rates, resulting in a higher rate upon cattle and hogs, the raw material, than upon live stock product, the manufactured article, where, as in this case, the articles are in sharp competition with each other in markets of purchase and sale, where it appears that upon other lines and in other sections rates are generally no higher, and in many instances much lower, on the traffic prejudiced than on that favored by the change, and where numerous and important industries which have been built up and maintained under the former adjustment, and those interested in such industries, will be injuriously affected by the action taken. *Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 428.

70. The rate of the St. Louis & San Francisco Railroad Company, for the transportation in carload lots of snapped corn from Grove, I. T., to Paris, Tex., is excessive and unreasonable to the extent that it exceeds 21 cents per 100 lbs. *H. B. Pitts & Son v. St. Louis & S. F. R. Co.* 684.

71. The proportional rates per 100 lbs. charged by the Atchison, Topeka, & Santa Fé Railway Company, on shipments of hay over its road and the road of the Texas & Pacific Railway Company, from Robinson and La Junta, Colo., and Dodge City Kan., to Marshall, Jefferson, and Kildare, Tex., were excessive and unreasonable to the extent that they exceeded 21 cents for the transportation to Ft. Worth, Tex.; and those of the Texas Company were excessive and unreasonable to the extent that they exceeded 15 cents for the transportation from Ft. Worth to the destinations named. *H. B. Pitts & Son v. Atchison, T. & S. F. R. Co.* 691.

72. It is the province of the Commission to interfere and secure, if possible, a fair adjustment in cases of unreasonable rates or unjust discrimination; but the Commission has no more authority to place competing millers in different states upon precisely the same footing than it has to equalize conditions in all localities and in every industry. *Wichita v. Missouri P. R. Co.* 35.

73. The rates from New York and other eastern points to Chattanooga are not shown to be unreasonable, within the meaning of section one of the Act, although they are higher than the rates from the same points

through Chattanooga to Nashville, the longer distance, as the traffic from New York and other eastern points is carried to Nashville and Chattanooga under substantially different circumstances and conditions. *Chamber of Commerce of Chattanooga v. Southern R. Co.* 111.

Of Terminal Charge, see TERMINAL CHARGE.

74. Defendant has had in force since April 25, 1903, rates per 100 lbs. on bananas in carloads from Charleston, S. C., which are 43 cents to Danville, Va., and 35½ cents to Lynchburg, Va., the transportation to the latter point by defendant's line being through Danville. The lower rate to Lynchburg is forced upon defendant by the competition of bananas coming from Baltimore. The 43 cent rate to Danville is not found to be unreasonable, and upon these facts the higher rate to Danville is not in violation of the Act to regulate commerce. *Gardner & Clark v. Southern R. Co.* 342.

75. Defendants' rate on horses and mules in less than carloads from Bayou Sara, La., to St. Louis, Mo., is the double first class rate of \$1.80 per 100 lbs., upon an estimated weight of 2,000 lbs. for each additional animal. The distance covered is 667 miles. This rate when applied to the transportation of a single animal is not unreasonable, but it is unreasonable for the shipment of four animals, amounting in that case to \$99, while the charge upon a carload of twenty-five animals is only \$100. Defendants' less than carload tariff would be rendered more just by reducing the charge to 90 cents per 100 lbs., first class rate, increasing the estimated weight of the first animal to 4,000 lbs., and leaving the rates for the additional animals as they now are, at 1,500 lbs. for the second and 1,000 lbs. for all others included in the shipment. *Barrow v. Yazoo & M. V. R. Co.* 333.

76. The Missouri, Kansas, & Texas Railway Company's rate of \$1.90 per ton on coal, lump and slack, from South McAlester, I. T., to Denison, Tex., a distance of 97 miles, is unreasonable and unjust, and should not exceed \$1.25 per ton. *Denison Light & Power Co. v. Missouri, K. & T. R. Co.* 337.

77. The charge imposed by the Atlantic Coast Line Railroad Company, of one cent higher than class D rates on cowpeas shipped from South and North Carolina points to New Orleans, is unreasonable and unjust; and cowpeas should be placed by it in class D and carried at the rate fixed for that class. *Swaffield v. Atlantic Coast Line R. Co.* 281.

78. The Mobile and Ohio companies' rates on freight articles generally from St. Louis, East St. Louis, and Cairo to Tupelo, Aberdeen, Columbus, West Point, and Starkville, are not found as a whole to be reasonable and just, nor, on the other hand, to be altogether unreasonable, but upon the facts of the case its rates upon grain and grain products are unreasonable, unjust, and unlawful, and should be reduced. *Aberdeen Group Commercial Asso. v. Mobile & O. R. Co.* 289.

79. Cowpeas, like clover and other grasses, are sown and then turned over by the plow for the purpose of soil improvement, but this is not a reason why cowpeas should, in the adjustment of freight rates, be classed as a fertilizer, which is applied directly to the soil; and cowpeas are further distinguished from fertilizer in that fertilizer furnishes the carrier

much greater tonnage, cowpeas have much greater value, and the vine, as well as the pea itself, is used as a food product. *Swaffield v. Atlantic Coast Line R. Co.* 281.

80. Defendant's regulation whereby the freight rate on peaches and other fruit from Georgia points is increased in proportion to the carload valuation fixed by the shipper is unreasonable and unjust, and the carrier can be required to respond in damages, if the fruit is damaged through its negligence, to the full amount of the injury sustained, without regard to the valuation placed upon it. *Georgia Peach Growers' Asso. v. Atlantic Coast Line R. Co.* 255.

81. The rates on lumber, in force prior to the defendant's advance of 2 cents per 100 lbs. on shipments from Georgia points to Ohio River destination, which advance was made on June 22, 1903, were reasonably high in comparison with the rates on other commodities which are at all analogous to lumber in respect to value, volume, risk, cost of handling, and other circumstances and conditions affecting the transportation of the traffic; and such advance was not warranted, and the increased rates thus in force are unreasonable and unjust. *Tift v. Southern R. Co.* 548.

82. Carriers have no right to advance a rate which is already reasonably high and yields an adequate return for the service rendered, solely because additional revenue is needed. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 505.

83. The advance of rates by defendants was the result of concerted action by them and other carriers; and while the question whether such concert of action is in violation of the anti-trust act is for the determination of the courts, it is the province and duty of this Commission, when the reasonableness of rates is in issue before it, to consider whether the advanced rates resulted from untrammelled competition, or were fixed by concert of action or combination of carriers. *Id.*; *Tift v. Southern R. Co.* 548.

84. The elements to be considered in determining the reasonableness of an entire system of rates are widely different from those involved in the question of the reasonableness of the rate upon a single commodity. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 505.

85. The test of the reasonableness of a rate is not the amount of the profit in the business of the shipper or manufacturer, but whether the rate yields a reasonable compensation for the services performed. Carriers necessarily and justly participate in the prosperity of their patrons in the resultant enlargement of their own business, and no rule is more firmly grounded in reason, or more universally recognized by carriers, than that the greater the tonnage of the article transported the lower should be the rate. *Tift v. Southern R. Co.* 548.

86. Where an advance is made in rates which have been long maintained, and the evidence shows that the traffic affected is large, important, and constantly increasing, the advance will be held unjust unless it is satisfactorily explained. *Id.*

87. Carriers have no right to advance a rate which is already reasonably high, and which yields an adequate return for the service rendered, solely because additional revenue is needed. The mere fact of the need of ad-

ditional revenue to meet increased expenses does not justify the advance in rates on lumber shipments from Georgia to and beyond the Ohio River, which are, for the most part, of low grade and comparatively small value. *Id.*

88. While the hauling of flat cars empty to the mills, or the practice of shippers to load cars below their capacity, are conditions which, to the extent they exist, are properly taken into account by carriers in fixing rates, it must be assumed that they were considered by defendants in making and maintaining the rates so long in force prior to the advance complained of. *Id.*

89. The rate of 47 cents on sugar from New Orleans to Wichita is unreasonable. *Lehman-Higginson Grocery Co. v. Atchison, T. & S. F. R. Co.* 460.

90. The rates in effect for long periods prior to the advance made by defendants of 2 cents per 100 lbs. on April 15, 1903, as well as the rates on lumber in carloads from points in lumber producing territories east of the Mississippi River in Louisiana, Mississippi, and part of Alabama, served by defendant roads, to Ohio River points, were remunerative to the defendant carriers, and the advance was unreasonable. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 505.

91. When a railroad company advances a rate which has been for some time in force, the fact of its continuance is in the nature of an admission against that company, which tends to show the unreasonableness of the advance. *Id.*

92. The advances in freight rates by defendants were not justified by the increased cost of operating the roads, where, although the operating expenses have constantly increased, they have been enlarged by the inclusion therein of large expenditures for permanent improvements, and defendants' gross earnings have increased from year to year to such extent as to result in a constant increase of net earnings. *Id.*; *Tift v. Southern R. Co.* 548.

93. The test of the reasonableness of a rate is not the amount of the profit in the business of the shipper or of the manufacturer, but whether the rate yields a reasonable compensation for the services performed. Carriers necessarily and justly participate in the prosperity of their patrons in the resultant enlargement of their own business. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 505.

94. The value of the entire property of a road can shed but little, if any, light upon the question whether the rate on one among thousands of articles of traffic yields its proper proportion of a fair return upon that value, and, moreover, the voluminous and conflicting testimony in this case on that subject does not enable the Commission to determine the value of defendants' respective properties. *Id.*

95. Lumber rates should be relatively low, in view of the fact that it is inexpensive freight and but few other commodities furnish to carriers so large a tonnage; the lumber business is constant, yielding carriers revenue all the year; no special equipment is constructed or furnished for its carriage; it is loaded by shippers and unloaded by consignees; and where

open cars are furnished the shipper is required, at considerable expense, to equip them so as to protect the lumber and the train; and there is small risk, and in case of accident the damage is insignificant. *Id.*

96. No rule is more firmly grounded in reason or more universally recognized by carriers than that the greater the tonnage of the article of traffic the lower should be the rate, and the defendants have made yellow pine lumber an exception to this rule. *Id.*

97. While the defendants, whose advances in rates are claimed to be unreasonable, are not bound to make "tap line" allowances in their territory which lies east of the Mississippi, merely because such allowances are granted to mill owners by other carriers in the territory west of the Mississippi, the fact that the rate west of the Mississippi River, minus the allowance, is reasonable, tends to support the proposition that a similar reduction east of the Mississippi would leave the rate reasonably high, and the Mobile & Ohio Railroad Company by voluntarily making such allowances east of the river, practically concedes this proposition as to itself. *Id.*

98. While the regulating statute may be applied to the reasonableness of a rate from a point in Canada to a point in the United States, it is clear that no law of the United States can apply to a discrimination between places in a foreign country. *Cist v. Michigan C. R. Co.* 217.

99. A passenger fare charge by defendant over its branch line from a point in Canada to a point in the United States, amounting to about 3 cents per mile for a distance of 35.3 miles, and including a 6-cent bridge-charge by an independent company, is not unreasonable upon the facts shown. *Id.*

100. Making certain charges for the transportation of coal shipped in carloads when the coal is loaded by tipple, and exacting a higher charge when it is loaded in some other way, is not justified by the difference in cost to a carrier between different methods of loading, or by other facts appearing in this case, and renders the higher rate thus made unreasonable, first, as against complainants, and, second, as against all other shippers of coal except those who load by tipple. *Glade Coal Co. v. Baltimore & O. R. Co.* 226.

101. Upon all the facts and circumstances, including, on the one hand, the difficulties and liability to loss attending the production and shipment of peaches, and, on the other hand, the large percentage of cars loaded above the prescribed minimum weights for carloads, for which excess no charge is made by the carriers, the exceptional character of the service, which involves fast time and prompt delivery at destination, the carriage of a large amount of nonpaying freight, return of cars without loads, and many other conditions relating to the highly perishable nature of the traffic,—*Held*, that neither the minimum carload weight nor the transportation charge established by the defendants engaged in the carriage of peaches in refrigerator cars from Georgia points to New York, based upon a rate of 81 cents from Atlanta to New York, is unreasonable or unjust. *Georgia Peach Growers' Asso. v. Atlantic Coast Line R. Co.* 255.

102. An arbitrary charge of \$80 per car imposed by the New York, New

Haven, & Hartford Railroad Company for the transportation from New York to Boston of peaches and other fruit shipped from Georgia points to Boston, its haul being part of the through service between the points of shipment and destination, is unreasonable and unjust; and \$50 per car would be a just and reasonable charge for such transportation. *Id.*

103. Defendant's present rate of \$1 per 100 lbs. on lemons in carloads from southern California to points on and east of the Missouri River is apparently reasonable. *Consolidated Forwarding Co. v. Southern P. Co.* 590.

104. Defendant's rate of \$1.25 per 100 lbs. on oranges in carloads carried from southern California to points on and east of the Missouri River is unreasonable and unjust. *Id.*

105. The shippers of cattle and hogs are unduly discriminated against by the exaction of higher rates for transporting cattle and hogs than for transporting live stock products to Chicago from points west, northwest, and southwest thereof, including Missouri River points and South St. Paul, Minn., as such discrimination is not justified by the difference in cost of transportation, or otherwise. *Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 428.

106. The refrigeration charges applying on shipments of citrus fruits from southern California points to the eastern markets have been reduced during the pendency of this proceeding, and the present charges for refrigeration are not found, upon the record of this case, to be unreasonable. *Consolidated Forwarding Co. v. Southern P. Co.* 590.

107. Railroad companies violate section 1 of the act to regulate commerce in making exclusive contracts with a car line company to furnish refrigerator cars, under which the car line company exacts charges for refrigeration service which greatly exceed those formerly made to cover the cost of icing by the railroad companies, and range from 50 to 150 per cent above those made prior to the contracts, by the car line company itself, as they thereby, in effect, impose upon shippers exorbitant charges for the transportation of fruits to markets in other states. *Re Transportation of Fruit*, 360.

108. Defendants' rule, providing that the minimum charge upon any single shipment of freight shall be for 100 pounds at the class or commodity rate applying upon the article, which is in force in the territory roughly described as south of the Ohio and Potomac and east of the Mississippi rivers, and also on traffic shipped to that territory from points in the central west,—is not, upon the facts of the case, shown to be unreasonable. *Wrigley v. Cleveland, C. C. & St. L. R. Co.* 412.

STORAGE RATES.

100. Storage rates and regulations enforced by common carriers subject to the Act to regulate commerce must be published at their stations and filed with the Commission. *Blackman v. Southern R. Co.* 352.

110. A railroad freight depot and a public storage warehouse are not used for similar purposes; and the charge for storage in the railroad depot may properly be made higher than the public warehouse charge, with the object of compelling the expeditious removal of freight. *Id.*

111. The Southern Railway Company in applying to complainants' interstate traffic at Macon, Ga., the storage rates prescribed by the Georgia railroad commission; and the Columbia, Newberry, & Laurens Railroad Company in applying to complainants' interstate traffic at Columbia, S. C., the storage rates prescribed by the South Carolina railroad commission,—did not violate the Act to regulate commerce, although such storage rates were in excess of the usual public warehouse charges in Macon and Columbia. *Id.*

THROUGH RATES—DIVISION OF RATES.

112. Under the Act to regulate commerce a common carrier subject to its provisions can allow a division of rates only to another common carrier which, participating in the particular traffic to which the rate is applied, is also subject to the Act to regulate commerce. The two lines may by contract or agreement establish a joint rate from the point of origin on the one road to the point of destination on the other, and agree between themselves as to the division of the rate. *Central Yellow Pine Assn. v. Vicksburg, S. & P. R. Co.* 193.

113. Treating the transportation of logs to mill by one line, and the transportation of the lumber from the mill by another line, as a through shipment, involves the right to mill in transit; and when that privilege is granted, the tariff should show upon its face that the transportation covers carriage of the log to and the lumber from the mill, and the division allowed to the carrier of the log should be named in all cases. *Id.*

114. An arbitrary charge of \$30 per car imposed by the New York, New Haven, & Hartford Railroad Company for the transportation from New York to Boston of peaches and other fruit shipped from Georgia points to Boston, its haul being part of the through service between the points of shipment and destination, is unreasonable and unjust; and \$50 per car would be a just and reasonable charge for such transportation. *Georgia Peach Growers' Assn. v. Atlantic Coast Line R. Co.* 255.

115. The transportation of the log to the mill by one line, and the transportation of the lumber from the mill by another line, may, under the circumstances of this case, be treated as in the nature of a through shipment from the point where the log is received to the point where the lumber is finally delivered; and the carrier of the lumber may, by joint arrangement with the log carrier, make such allowance toward the cost of moving the log as would be fairly involved in moving the lumber from the point where the log is received for carriage, provided always that the carrier of the log is a common carrier by rail; but this holding extends the application of the principle of milling in transit to the extreme limit. *Central Yellow Pine Assn. v. Vicksburg, S. & P. R. Co.* 193.

116. While an association of shippers has no direct interest in a determination of the question as to whether divisions or allowances from published tariff rates, made by defendants to tap lines owned or controlled by other shippers, constitute departures from the published rates, it has such an indirect interest as entitles it, under the statute, to maintain a proceeding to have such division declared unlawful. *Id.*

117. Generally speaking, the public is not interested in the division of a through rate, and the Commission, therefore, has no authority to condemn the division of the rate, unless a part of the through line and the article shipped have a common ownership, and a grossly excessive division is made for the purpose of paying a rebate. *Re Transportation of Salt*, 148.

118. The share of the through rate for the transportation of salt from producing points in Michigan to points on the Missouri River, which is allowed to the boat line on Lake Michigan, the controlling interest in which is owned by the same persons who own a controlling interest in the corporations producing salt at the point named, and which share amounts to from 30 to 33½ per cent of the through rate, and is considerably higher than the former charge of carrying salt on Lake Michigan, but which increase is partly accounted for by the fact that additional services are included,—is not so grossly disproportionate to the value of the additional through services as to amount to a rebate in favor of the salt interests which control the boat line. *Id.*

119. No undue preference between individuals or localities is made by defendants in the granting of divisions in rates to lumber mills owning or controlling originating roads called "tap lines," while other carriers fail or refuse to allow like concessions to members of the complaining association, located in a different section of the country. *Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co.* 193.

120. The act of February 19, 1903 (the so-called "Elkins law"), which applies both to the carrier and the party receiving the concession, has been systematically and continuously violated by the Atchison, Topeka & Santa Fé Railway Company and the Colorado Fuel & Iron Company from the day of its passage down to November 27, 1904, when the tariffs upon which this coal moved were reduced in all cases, \$1.15. *Re Transportation of Coal & Mine Supplies*, 473.

121. Where excessive divisions of rates are granted by the carrier to another carrier owned and controlled by a shipper, for the purpose of obtaining the traffic of that shipper, they benefit the shipper, and operate as a rebate or other device to cut the tariff charge, in violation of the Act to regulate commerce. *Re Division of Joint Rates, etc.* 385.

122. While there may be great objections to allowing shippers to build and operate railroads over which their traffic moves, such action is not prohibited by the Act to regulate commerce. And the mere fact that the property of a common carrier is owned by the largest individual shipper over it, or that it was originally constructed for the purpose of doing the work of that shipper, furnishes no reason why it cannot make joint rates and agree upon joint divisions with other railroads. *Id.*

123. The second section of the Act to regulate commerce, which prohibits rebates whereby one shipper is preferred to another, refers to a like and contemporaneous service performed under similar circumstances and conditions; and, in the absence of a showing of such similarity of circumstances and conditions, such section is not violated by the granting of divisions of
10 I. C. C. REP.—48.

rates to lumber mills owning or controlling short originating roads, while other carriers fail or refuse to allow like concessions to complainants located in a different section of the country. *Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co.* 193.

124. The logging roads, or "tap lines," to which the defendant, the Mobile & Ohio Railroad Company, grants allowances from its published rates, are not common carriers, but such tap lines are the private property of mill owners, and the allowances are therefore unlawful. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 505.

125. While defendant carrier was entitled to insist upon the application of the through rate to the through shipment on its line to Hope, Ark., instead of applying the sum of local rates based upon Texarkana, Ark., which sum was less than the published through charge, it could not lawfully refuse to receive and carry complainant's freight to Texarkana under the local rate to that point, even though the complainant's attempt to ship its freight to Texarkana was for the purpose of having it subsequently re-shipped from that point by another line to Hope, Ark. *Hope Cotton Oil Co. v. Texas & P. R. Co.* 696.

126. The Illinois Terminal Railway Company was organized in the interest of the Illinois Glass Company, and uses tracks constructed by the latter on its private grounds at Alton, Ill., for the purpose of connecting its plant with different lines of railway. *Re Division of Joint Rates*, 661.

127. The Illinois Terminal Railway Company receives an excessively large share on the division of the through rate on goods transported over it to the Illinois Glass Company, which concession is illegal, provided the glass company owns and operates the Illinois Terminal Railway, but a different question may be presented if it appears that the holders of the capital stock of the glass company own the railroad company. *Id.*

128. An unlawful preference to the United States Steel Corporation, which owns and controls the Illinois Steel Company, is practised under a division of rates whereby the Chicago, Lake Shore, and Eastern Railway Company, a terminal road owned by the United States Steel Corporation, and operated between the Illinois Steel Company's works, obtains a grossly excessive division for the service rendered. *Re Division of Joint Rates, etc.* 385.

129. In holding that an allowance of compensation to a shipper by the carrier for transferring his shipment from East St. Louis to the carrier's St. Louis depot, where similar compensation was denied other carriers, was illegal, no opinion was expressed as to whether lines leading west from St. Louis may properly apply the St. Louis rate to the station of a bona fide transfer company in East St. Louis and absorb the cost of transfer to St. Louis: neither was any opinion expressed as to whether the rail carriers may, by proper schedules, allow all shippers from East St. Louis a fixed sum per 100 lbs. for transporting their merchandise to the carrier's depots in St. Louis, those questions not being presented by the record in the same proceeding. *Re Division of Joint Rates*, 661.

130. An unlawful preference in favor of the International Harvester Company is practised by means of the division of the through rate, under

which division the Illinois Northern Railroad Company, owned by such Harvester Company, and the Chicago, West Pullman, & Southern Railroad Company, controlled by it, receive a percentage of the rate which amounts to about \$12 per car, for services which were formerly performed by these terminal roads as a switching charge, and which amounted to a maximum of \$3.50 per car, which was reasonable for these services. *Re Division of Joint Rates, etc.* 385.

131. Considering the defendants as a single line, the granting of transit milling west of Pittsburg and denying it to millers at Harrisburg is not necessarily unlawful, because conditions on that line in Ohio and Indiana may be very different from conditions in eastern Pennsylvania; but such differences have not been shown, nor their bearing explained, and upon the meager and incomplete facts now appearing, the Commission is not warranted in making a decision which in principle, if complainant's contention is well founded, would involve a general extension of transit privileges into a large territory where heretofore such privileges have not been allowed. *Koch v. Pennsylvania R. Co.* 675.

132. Shippers are not entitled, as a matter of fact, to mill grain in transit and forward the milled product under the through rate in force on the grain from the point of origin to the place of ultimate destination; but allowances of the privilege by a carrier to shippers in one section must be without wrongful prejudice to the rights of shippers in another section served by its line. *Id.*

133. The Granite City, Alton, & Eastern Railroad Company was organized for the purpose of operating several thousand feet of railway used in the business of the St. Louis Syrup & Preserving Company and located on the latter's private grounds at Granite City, Ill. The Granite City company has constructed a short track outside the limits of the grounds of the preserving company, and uses, jointly with other companies, another track about 3,000 feet in length. By means of these tracks the Granite City company connects with other railroad companies, and is paid by the latter certain divisions of transportation charges on traffic shipped by the preserving company and hauled to such connections by the Granite City company. Assuming that the Granite City company and the preserving company are identical in ownership, concerning which a definite finding is not made,—*Held*, that the payments to the Granite City company constitute rebates, and are illegal. *Re Division of Joint Rates*, 661.

134. The Atchison, Topeka, & Santa Fé Railway Company grossly and continuously violated the Act to regulate commerce in the following respects: It published rates on interstate shipments of coal from mines in Colorado and New Mexico, which, under the tariffs, applied only to the transportation thereof, but which for the Colorado Fuel & Iron Company were made by the railway company to include the price of the coal; and such price was paid to the fuel and iron company by the railway company; while giving rebates to the fuel and iron company from such tariff rates, it charged the full tariff rates on interstate shipments of coal by other

shippers, in not only the general coal region involved, but in the same coal field; which practice of the railway company resulted in closing markets for coal to shippers competing with the Colorado Fuel & Iron Company. *Re Transportation of Coal & Mine Supplies*, 473.

135. Carriers operating lines to points west of the Mississippi River make rates to such points, which are the same from East St. Louis, Ill., as from St. Louis, Mo. Most of the freight is carried from East St. Louis to the St. Louis depots by transfer companies, who receive from the carriers 5 cents per 100 lbs. for such transfer. The Grant Chemical Company, a shipper, receives a like sum for a similar transfer by it of its shipments to East St. Louis, which payment is refused to other shippers. The Eclipse Transfer Company was organized for the sole purpose of obtaining this payment; it uses teams owned by the Simmons Hardware Company, and uses the storehouse of the latter for a receiving depot. These payments to the Grant Chemical Company and the Eclipse Transfer Company are illegal. *Re Division of Joint Rates*, 661.

136. A division of a freight rate with another railroad company constitutes a mere subterfuge to give a concession in the rate, and is unlawful, where the railroad company receiving the division of the rate, while owning four or five thousand feet of railway siding adjoining one of several plants belonging to the shipper, does not own any equipment or rolling stock, and is not in any way engaged as a common carrier, but is in fact controlled by the officers of the shipping company, who control its earnings and receive the benefit of the division of the rate, thereby enabling it to sell its produce at prices which its competitors cannot meet. *Re Transportation of Salt from Hutchinson*, 1.

137. Where excessive divisions of rates are granted by the carrier to another carrier owned and controlled by a shipper, for the purpose of obtaining the traffic of that shipper, they benefit the shipper, and operate as a rebate or other device to cut the tariff charge, in violation of the Act to regulate commerce. *Re Division of Joint Rates, etc.* 385.

INSTANCES.

On baking powder. *Re Transportation of Salt from Hutchinson*, 1.

On bananas. *Gardner & Clark v. Southern R. Co.* 342.

On cattle. *Chicago Live Stock Exchange v. Chicago, G. W. R. Co.* 428.

On coal. *Re Transportation of Coal & Mine Supplies*, 473.

Glade Coal Co. v. Baltimore & O. R. Co. 226.

Denison Light & Power Co. v. Missouri P. R. Co. 337.

On cowpeas. *Swafield v. Atlantic Coast Line R. Co.* 281.

On flour. *Wichita v. Missouri P. R. Co.* 35.

On fruits. *Consolidated Forwarding Co. v. Southern P. R. Co.* 590.

On grain. *Cannon Falls Farmers' Elevator Co. v. Chicago G. W. R. Co.* 650.

On hogs. *Chicago Live Stock Exchange v. Chicago G. W. R. Co.* 428.

On horses. *Barrow v. Yazoo & M. V. R. Co.* 333.

On immigrants. *Re Transportation of Immigrants from New York*, 13.

On lemons. *Consolidated Forwarding Co. v. Southern P. R. Co.* 590.

On live stock. *Chicago Live Stock Exchange v. Chicago, G. W. R. Co.* 428.

On lumber. *G. C. Pratt Lumber Co. v. Chicago, I. & L. R. Co.* 29.

Mereshon S. P. & Co. v. Central R. Co. 456.

Tift v. Southern R. Co. 548.

Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co. 193.

On mules. *Barrow v. Yazoo & M. V. R. Co.* 333.

On peaches. *Georgia Peach Growers' Asso. v. Atlantic Coast Line R. Co.* 255.

On perishable freight. *Re Transportation of Fruit*, 360.

Georgia Peach Growers' Asso. v. Atlantic Coast Line R. Co. 255.

On rye. *Cannon Falls Farmers' Elevator Co. v. Chicago G. W. R. Co.* 650.

On salt. *Re Transportation of Salt*, 148.

Re Transportation of Salt from Hutchinson, 1.

On shingles. *Duluth Shingle Co. v. Duluth S. S. & A. R. Co.* 489.

On snapped corn. *H. B. Pitts & Son v. St. Louis & S. F. R. Co.* 691.

On sugar. *Lehman-Higginson Grocer Co. v. Atchison T. & S. F. R. Co.* 460.

Parlor car rates. *Hewins v. New York, N. H. & H. R. Co.* 221.

Passenger rates. *Cist v. Michigan C. R. Co.* 217.

Refrigeration charges. *Consolidated Forwarding Co. v. Southern P. R. Co.* 590.

REBATES.

1. A division of a freight rate with another railroad company constitutes a mere subterfuge to give a concession in the rate, and is unlawful, where the railroad company receiving the division of the rate, while owning four or five thousand feet of railway siding adjoining one of several plants belonging to the shipper, does not own any equipment or rolling stock, and is not in any way engaged as a common carrier, but is in fact controlled by the officers of the shipping company who control its earnings and receive the benefit of the division of the rate, thereby enabling it to sell its produce at prices which its competitors cannot meet. *Re Transportation of Salt from Hutchinson*, 1.

2. While there may be great objections to allowing shippers to build and operate railroads over which their traffic moves, such action is not prohibited by the Act to Regulate Commerce. And the mere fact that the property of a common carrier is owned by the largest individual shipper over it, or that it was originally constructed for the purpose of doing the work of that shipper, furnishes no reason why it cannot make joint rates and agree upon joint divisions with other railroads. *Re Division of Joint Rates, etc.* 385.

3. Where excessive divisions of rates are granted by the carrier to another carrier owned and controlled by a shipper, for the purpose of obtaining the traffic of that shipper, they benefit the shipper, and operate as a rebate or other device to cut the tariff charge, in violation of the Act to regulate commerce. *Id.*

4. An unlawful preference in favor of the International Harvester Company is practised by means of the division of the through rate under which division the Illinois Northern Railroad Company, owned by such Harvester Company, and the Chicago, West Pullman, & Southern Railroad Company, controlled by it, receive a percentage of the rate, which amounts to about \$12 per car, for services which were formerly performed by these terminal roads as a switching charge, and which amounted to a maximum of \$3.50 per car, which was reasonable for these services. *Id.*

5. An unlawful preference to the United States Steel Corporation, which owns and controls the Illinois Steel Company is practised under a division of rates whereby the Chicago, Lake Shore & Eastern Railway Company, a terminal road owned by the United States Steel Corporation, and operated between the Illinois Steel Company's works, obtains a grossly excessive division for the service rendered. *Id.*

6. The Granite City, Alton, & Eastern Railroad Company was organized for the purpose of operating several thousand feet of railway used in the business of the St. Louis Syrup & Preserving Company and located on the latter's private grounds at Granite City, Ill. The Granite City company has constructed a short track outside the limits of the grounds of the preserving company, and uses, jointly with other companies, another track about 3,000 feet in length. By means of these tracks the Granite City company connects with other railroad companies, and is paid by the latter certain divisions of transportation charges on traffic shipped by the preserving company and hauled to such connections by the Granite City company. Assuming that the Granite City company and the preserving company are identical in ownership, concerning which a definite finding is not made,—*Held*, that the payments to the Granite City company constitute rebates, and are illegal. *Re Division of Joint Rates*, 661.

7. The Illinois Terminal Railway Company receives an excessively large share on the division of the through rate on goods transported over it to the Illinois Glass Company, which concession is illegal, provided the glass company owns and operates the Illinois Terminal Railway; but a different question may be presented if it appears that the holders of the capital stock of the glass company own the railroad company. *Id.*

8. Carriers operating lines to points west of the Mississippi River make rates to such points, which are the same from East St. Louis, Ill., as from St. Louis, Mo. Most of the freight is carried from East St. Louis to the St. Louis depots by transfer companies, who receive from the carriers 5 cents per 100 lbs. for such transfer. The Grant Chemical Company, a shipper, receives a like sum for a similar transfer by it of its shipments to East St. Louis, which payment is refused to other shippers. The Eclipse Transfer Company was organized for the sole purpose of obtaining this payment; it uses teams owned by the Simmons Hardware Company, and uses the storehouse of the latter for a receiving depot. These payments to the Grant Chemical Company and the Eclipse Transfer Company are illegal. *Id.*

9. In holding that an allowance of compensation to a shipper by the carrier for transferring his shipment from East St. Louis to the carrier's

St. Louis depot, where similar compensation was denied other carriers, was illegal, no opinion was expressed as to whether lines leading west from St. Louis may properly apply the St. Louis rate to the station of a bona fide transfer company in East St. Louis, and absorb the cost of transfer to St. Louis; neither was any opinion expressed as to whether the rail carriers may, by proper schedules, allow all shippers from East St. Louis a fixed sum per 100 lbs. for transporting their merchandise to the carrier's depots in St. Louis, those questions not being presented by the record in the same proceeding. *Id.*

10. The share of the through rate for the transportation of salt from producing points in Michigan to points on the Missouri River, which is allowed to the boat line on Lake Michigan, the controlling interest in which is owned by the same persons who own a controlling interest in the corporations producing salt at the point named, and which share amounts to from 30 to 33½ per cent of the through rate, and is considerably higher than the former charge of carrying salt on Lake Michigan, but which increase is partly accounted for by the fact that additional services are included,—is not so grossly disproportionate to the value of the additional through services as to amount to a rebate in favor of the salt interests which control the boat line. *Id.*

11. The second section of the Act to Regulate Commerce, which prohibits rebates whereby one shipper is preferred to another, refers to a like and contemporaneous service performed under similar circumstances and conditions; and in the absence of a showing of such similarity of circumstances and conditions, such section is not violated by the granting of divisions of rates to lumber mills owning or controlling short originating roads, while other carriers fail or refuse to allow like concessions to complainants located in a different section of the country. *Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co.* 193.

12. Defendants publish a certain rate on lumber from stations upon their lines, which must be strictly observed and charged to all shippers alike; and they are not entitled, under the Act to Regulate Commerce, to grant a division of the rate to the owner of a lumber mill as compensation to him for the cost of bringing his logs to the mill by steam railroad, horse railroad, wagon, or any other means of conveyance. *Id.*

13. The construction of grain elevators by a shipper, and the allowance by the carrier of 1½ cents per 100 lbs. for elevator or transfer service to the corporations controlled by the shipper and which conduct the elevator, does not amount to a rebate. *Matter of Allowances to Elevators*, 309.

14. The act of February 19, 1903 (the so-called "Elkins law"), which applies both to the carrier and the party receiving the concession, has been systematically and continuously violated by the Atchison, Topeka & Santa Fé Railway Company and the Colorado Fuel & Iron Company from the day of its passage down to November 27, 1904, when the tariffs upon which coal moved were reduced in all cases \$1.15. *Re Transportation of Coal & Mine Supplies*, 473.

15. The Atchison, Topeka & Santa Fé Railway Company grossly and continuously violated the Act to Regulate Commerce in the following respects:

It published rates on interstate shipments of coal from mines in Colorado and New Mexico, which, under the tariffs, applied only to the transportation thereof, but which for the Colorado Fuel & Iron Company were made by the railway company to include the price of the coal, and such price was paid to the fuel and iron company by the railway company. While giving rebates to the fuel and iron company from such tariff rates, it charged the full tariff rates on interstate shipments of coal by other shippers in not only the general coal region involved, but in the same coal field; which practice of the railway company resulted in closing markets for coal to shippers competing with the Colorado Fuel & Iron Company. *Id.*

16. The logging roads, or "tap lines," to which the defendant, the Mobile & Ohio Railway Company grants allowances from its published rates, are not common carriers, but such tap lines are the private property of mill owners, and the allowances are therefore unlawful. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 505.

REFRIGERATOR CARS.

1. Upon all the facts and circumstances, including, on the one hand, the difficulties and liability to loss attending the production and shipment of peaches, and, on the other hand, the large percentage of cars loaded above the prescribed minimum weights for carloads, for which excess no charge is made by the carriers, the exceptional character of the service, which involves fast time and prompt delivery at destination, the carriage of a large amount of nonpaying freight, return of cars without loads, and many other conditions relating to the highly perishable nature of the traffic,—*Held*, that neither the minimum carload weight nor the transportation charge established by the defendants engaged in the carriage of peaches in refrigerator cars from Georgia points to New York, based upon a rate of 81 cents from Atlanta to New York, is unreasonable or unjust. *Georgia Peach Growers' Asso. v. Atlantic Coast Line R. Co.* 255.

2. When charges for refrigeration are applied in the transportation of perishable freight, such charges should be published and adhered to as all other charges for transportation are published and observed. The same considerations of justice and public policy which require this in case of the freight rate apply to the charge for refrigeration. *Re Transportation of Fruit*, 360.

3. Railroad companies violate section one of the Act to Regulate Commerce in making exclusive contracts with car line companies to furnish refrigerator cars, under which the car line companies exact charges for refrigeration service which greatly exceed those formerly made to cover the cost of icing by the railroad companies, and range from 50 to 150 per cent above those made, prior to the contracts, by the car line company itself, as they thereby in effect impose upon shippers exorbitant charges for the transportation of fruits to markets in other states. *Id.*

4. The refrigeration charges applying on shipments of citrus fruits from southern California points to the eastern markets have been reduced during the pendency of this proceeding, and the present charges for refrigeration

are not found, upon the record of this case, to be unreasonable. *Consolidated Forwarding Co. v. Southern P. Co.* 590.

5. Whether or not the regulating statute applies to refrigeration charges in all cases, the defendants, by compelling shippers to pay icing charges on citrus fruits as established by the car lines, or do without necessary refrigeration for the traffic, have made these charges part of the cost of transportation, and subject to regulation under the law. *Id.*

6. Defendants' minimum carload weight of 26,000 lbs. for the carriage of citrus fruit in refrigerator or ventilator cars from southern California points to eastern destinations is not unreasonable, with the 40-foot car in general use. *Id.*

7. It is the duty of the respondent railroad companies engaged as common carriers in transporting fruits from points in Michigan, to furnish refrigerator cars for such service; but such duty arises out of their common-law liability, not under the Act to Regulate Commerce; and redress for failure to fulfil it must be sought in the courts. *Re Transportation of Fruit*, 360.

8. A railroad company may provide refrigerator cars by purchase or by lease, and if the latter plan is adopted they may make contracts with one company which exclude the use of cars owned by other companies. *Id.*

9. Carriers should, in the opinion of the Commission, be legally compellable to furnish ice for the refrigeration of refrigerator cars used upon their lines; but if it is not part of the obligation of the common carrier to provide such refrigeration, when it does furnish it, and at the same time prohibits the shipper from obtaining it from any other source, the charge for refrigeration is part of the total charge for transportation furnished by the carrier, and must be reasonable. *Id.*

REHEARING.

Complainant was granted leave to apply within a limited time for a further hearing, where its proof failed to indicate with any degree of certainty the damage caused by the wrongful discrimination, and the amount which it was entitled to recover by way of reparation. *Richmond Elevator Co. v. Pere Marquette R. Co.* 629.

REPARATION.

1. The decision of the Supreme Court sustaining the view of the Commission as to the unlawfulness and excessiveness of a terminal charge, but dismissing the proceeding on account of a subsequent reduction in the through rate, which amounted to more than the terminal charge, constitutes no bar to submission of proof before the Commission upon the question of reparation, covering the period elapsing prior to the reduction in the through rate referred to, which question had been properly held open by the Commission pending determination of the other branch of the case. *Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co.* 83.

2. Reparation awarded to complainant for defendant's refusal to furnish cars for the shipment of cross ties, while it did furnish cars to other persons for the interstate shipment of lumber, stone, and many other freight

articles in the bundles and for the shipment of cross ties destined almost entirely to the U. S. *Cargo*. To *U. S. v. Detroit & R. Co.* 422

4. The difficulty of any estimate unjustly discriminated against the complainant, which entitles it to sue for various points in Michigan, but the proof fails to indicate with any degree of certainty the damage caused by the wrongful discrimination, and the amount which the complainant was entitled to recover by way of reparation. *Richmond Ex-tractor Co. v. Iowa Lumber Co.* 1. 4. 22.

5. The complainant is entitled to reparation to the extent that the charges exacted from them in annual 100% of snapped corn from Grove, La. to Marshall, Tex. exceeds 25 cents per 100 lbs., which includes 21 cents per 100 lbs. for a reasonable rate from Grove, La. to Paris, Tex., and 4 cents proportional rate of transportation from Paris to Marshall. *I. I. Pitt & Son v. St. Louis & N. O. R. Co.* 641.

6. The complainant is entitled to reparation from the Atchison, Topeka & Santa Fe Railway Company in the sum of \$196.84, and from the Texas & Pacific Railway Company in the sum of \$51.95, with interest from August 1, 1903, on account of the excessive proportional rates imposed on these companies on shipments from Robinson and La Junta, Colo., and Dodge City, Kan., to Marshall, Jefferson, and Kildare, Tex., by way of Ft. Worth, Tex. *I. I. Pitt & Son v. Atchison, T. & S. F. R. Co.* 691.

7. The complainant is entitled to reparation for damages resulting from its inability to ship 140 tons of cotton seed to Hope, which it had contracted or intended to have transported over defendant's line to Texasiana, and then by way of another line to Hope, and which shipment defendant had refused to accept under its local rate to Texasiana, but attempted to compel the complainant to pay the through rate to Hope, which was higher than the local rates based upon Texasiana, Ark. *Hope Cotton Co. v. A. T. & Texas & P. R. Co.* 696.

8. The proportional rates per 100 lbs. charged by the Atchison, Topeka & Santa Fe Railway on shipments or way over its road and the road of the Texas & Pacific Railroad Company from Robinson and La Junta, Colo., and Dodge City, Kan., to Marshall, Jefferson, and Kildare, Tex., were excessive and unreasonable to the extent that they exceeded 21 cents of the transportation to Ft. Worth, Tex., and those of the Texas Company were excessive and unreasonable to the extent that they exceeded 4 cents of the transportation from Ft. Worth to the destination named. *I. I. Pitt & Son v. Atchison, T. & P. R. Co.* 691.

9. The act to Regulate Commerce doesn't confer authority upon the Commission to award damages in cases brought before it, and as such award is simply a recommendation, which can only be enforced by a suit as a enforcing and opportunity for a jury trial the Act in this respect is, in the opinion of the Commission, unconstitutional and valid. *Cattle Owners Assn. v. Chicago, B. & Q. R. Co.* 81.

10. The effect of an affidavit in through rates after the Supreme Court had dismissed a proceeding to have certain terminal charges declared unlawful and unlawful, which dismissal was upon the ground that there had

been a reduction in the through rate greater than the terminal charge, cannot be determined in a proceeding in the same suit for reparation, as regards territory to which the reduction in the through rate did not apply, but is a matter for independent inquiry in a new proceeding. *Id.*

10. A decision of the Supreme Court sustaining the view of the Commission as to the illegality of certain terminal charges, but dismissing the proceeding on account of a subsequent reduction in the through rate, which had been made from certain territory, and which reduction amounted to more than the terminal charges involved; and authorizing the Commission to commence proceedings to correct any unreasonableness in the rate resulting from the additional terminal charge as to any territory to which the reduction referred to did not apply,—does not estop the Commission from further proceeding and investigation as to the legality of a terminal charge for the future, without the institution of a new proceeding, as the Commission is not *functus officio*; and the mere use by the Supreme Court in its decree of the word “commencing,” with reference to further proceedings, is not construed to require the formal institution of a new proceeding. The case will, therefore, stand reopened for further investigation and order, with leave to complainant to show to what territory the through rate reduction applied. *Id.*

11. In determining the question of reparation in a suit to declare a terminal charge excessive and unlawful, where the question of reparation was held open pending determination of another branch of the case, and during which time a reduction in the through rate was made from certain territory, which reduction amounted to more than the terminal charge, the following procedure was directed by the Commission: Damages to be allowed on shipments from all territory down to the date in the reduction in the through rates, and, from territory to which that reduction did not apply, down to the date of the hearing; but it was directed that those damages accruing before and those accruing after the original order of the Commission holding the terminal charge unlawful and unjust be shown separately, with leave to defendants to show any change in the conditions since the date of the order of the Commission, which would render the entire through rate, including the terminal charge, a reasonable one. *Id.*

12. Whatever may be said of the right or status of shippers generally as to reparation for damages resulting from a rate or charge declared by the Commission to be unlawful, the Cattle Raisers' Association of Texas is entitled in this case to show damages to its members, and upon such showing the Commission will order reparation; but in view of the unsettled state of the law in this respect, and in order that all phases of the question may be presented to the court, the members of the association seeking damages should file claims in the nature of an intervening petition. *Id.*

13. Defendant's refusal to furnish cars to complainants between February 25 and March 26 on the Deal side track at Meyersdale and the side track of the Savage Brick Company at Keystone Junction, while furnishing and offering to furnish cars to complainants' competitors at other

points, under the circumstances disclosed by the evidence and described in the findings, was undue and unlawful discrimination against complainants, for which they are entitled to reparation. *Glade Coal Co. v. Baltimore & O. R. Co.* 226.

14. While the Commission found as a fact that the charges of defendant were in some instances unreasonable, it made no attempt to formulate an order, as it had no power to prescribe the rate that should be put into effect; but it held that complainant might apply to it for reparation in case it should thereafter be compelled to pay rates in excess of those indicated. *Barrow v. Yazoo & M. V. R. Co.* 333.

15. Where the record was not sufficiently definite to enable the Commission to make an order for reparation, it held the case open to enable the complainant to present further testimony upon that branch of the case. *Denison Light & Power Co. v. Missouri, K. & T. R. Co.* 337.

16. The complainants are not entitled to reparation, although they have apparently paid for the transportation of bananas from Lynchburg to Danville, which were in fact never transported, where the result to them was the same in money as, and more favorable in convenience than, though the entire carload had been shipped to Lynchburg and the half reshipped. *Gardner & Clark v. Southern R. Co.* 342.

17. The defendant can claim no benefit from its own wrong, and hence it is not entitled to reparation where it permits a shipper to do acts in disregard of its regulations, which result in charges below those applicable under defendant's published tariff. *Id.*

18. The complainants are entitled to reparation to the extent of 13 cents per 100 lbs., amounting to \$130 on their shipments, where the defendant's rate was 43 cents to Danville and 20 cents to Lynchburg. The 20 cent rate to Lynchburg violated the Act to Regulate Commerce in that it was 13 cents below the rate which was justified by competition from Baltimore or elsewhere. *Id.*

19. Although the allegations concerning reparation, contained in the original petition asking the Commission to order the defendants to desist from imposing an unreasonable and unjust terminal charge, are plainly sufficient to constitute the basis for an award of damages, the defendants are entitled, before the hearing, to a specification showing in detail the amounts for which recovery is sought. *Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co.* 83.

RES JUDICATA. See JUDGMENTS.

RULES.

Merely putting in evidence defendant's rule of car apportionment is insufficient to show discrimination against the complainant; the actual effect of the rule during the time covered by the complaint is necessary to a determination of the question of unfairness in the distribution of cars. *Richmond Elevator Co. v. Pere Marquette R. Co.* 629.

RYE.

Rates on. *Cannon Falls Farmers' Elevator Co. v. Chicago G. W. R. Co.* 650.

SALT.

Rates on. *Re Transportation of Salt from Hutchinson*, 1.
Re Transportation of Salt, 148.

SASH.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

SASH WEIGHTS.

Table showing car capacity and actual loading capacity when loaded with sash weights as compared with other commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 533.

Tift v. Southern R. Co. 577.

SAWDUST.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

SCHEDULES OR TARIFFS.

1. The carriers will be afforded an opportunity to adjust their tariffs and arrangements, and, if so advised, present the subject to Congress, provided, however, that in the meantime all carriers which do not publish and maintain import and export tariffs shall file with the Commission, as promptly as possible, a statement of the rates actually charged. If the Act is not amended within a reasonable time, it will be the duty of the Commission to enforce the publication of import and export rates in the manner now provided by law. *Re Publication & Filing of Tariffs*, 55.

2. The Act to Regulate Commerce now requires the publication of import and export tariffs in the same manner as domestic tariffs. *Id.*

3. If carriers are to any extent relieved from giving the notice now required, of advances and reductions in rates upon foreign commerce, they should in all cases file with the Commission the rates actually made, and give such further notice to the public as may be possible. *Id.*

4. Public policy urgently requires that the inland transportation of import and export commerce should be subject to the Act to Regulate Commerce, and the publishing and maintaining of tariffs upon such traffic imposes in some instances no hardship upon the carrier. There may be cases in which a modification of this rule would be of service to the carrier without detriment to the public, and perhaps other instances in which such a modification should be granted in the interest of both the carrier and the public. This can only be accomplished by an amendment of the Act, since the provisions of the statute are mandatory, and the Commission has no power to modify their requirements. *Id.*

5. The provisions of section six of the Act to Regulate Commerce are not complied with by posting a notice stating that tariffs may be inspected

upon application to the carrier's agent. *Paxton Tie Co. v. Detroit S. R. Co.* 422.

6. When charges for refrigeration are applied in the transportation of perishable freight, such charges should be published and adhered to as all other charges for transportation are published and observed. The same considerations of justice and public policy which require this in case of the freight rate apply to the charge for refrigeration. *Re Transportation of Fruit*, 360.

7. It is the duty of railroad companies, under the Act to Regulate Commerce, to print, publish, and file tariffs showing rates, which are so simplified that persons of ordinary comprehension can understand them; and a notation in the tariff of one carrier, making reference to the tariff of some competing carrier, does not meet the requirement of the law that the rate charged shall be published and filed. *H. B. Pitts & Son v. St. Louis & S. F. R. Co.* 684.

8. Defendants' rate on horses and mules in less than carloads from Bayou Sara, La., to St. Louis, Mo., is the double first class rate of \$1.80 per 100 lbs. upon an estimated weight of 2,000 lbs. for each additional animal. The distance covered is 667 miles. This rate when applied to the transportation of a single animal is not unreasonable, but it is unreasonable for the shipment of four animals, amounting in this case to \$99, while the charge upon a carload of twenty-five animals is only \$100. Defendants' less than carload tariff would be rendered more just by reducing the charge to 90 cents per 100 lbs., first class rate, increasing the estimated weight of the first animal to 4,000 lbs. and leaving the rates for the additional animals as they now are, at 1,500 lbs. for the second and 1,000 lbs. for all others included in the shipment. *Barrow v. Yazoo & M. V. R. Co.* 333.

9. The Texas & Pacific Railway Company's rate on beef cattle in carloads from Ft. Worth, Tex., to New Orleans, La., is 42½ cents per 100 lbs., and \$15 per car additional, when shipment is made in lots of less than ten carloads. Upon complaint against the imposition of the additional \$15 per car,—*Held*, that the charge of \$15 per car in addition to the rate of 42½ cents per 100 lbs. is unreasonable when applied to single carload shipments. *New Orleans Live Stock Exch. v. Texas & P. R. Co.* 327.

10. Cowpeas, like clover and other grasses, are sown and then turned over by the plow for the purpose of soil improvement, but this is not a reason why cowpeas should, in the adjustment of freight rates, be classed as a fertilizer, which is applied directly to the soil; and cowpeas are further distinguished from fertilizer in that fertilizer furnishes the carrier much greater tonnage, cowpeas have much greater value, and the vine, as well as the pea itself, is used as a food product. *Swaffield v. Atlantic Coast Line R. Co.* 281.

11. The charge imposed by the Atlantic Coast Line Railroad Company, of one cent higher than class D rates on cowpeas shipped from South Carolina and North Carolina points to New Orleans, is unreasonable and unjust, and cowpeas should be placed by it in class D, and carried at the rate fixed for that class. *Id.*

12. Treating the transportation of the log to the mill by one line, and the transportation of the lumber from the mill by another line, as a through shipment, involves the right to mill in transit; and when that privilege is granted, the tariff should show upon its face that the transportation covers carriage of the log to and the lumber from the mill; and the division allowed to the carrier of the log should be named in all cases. *Central Yellow Pine Asso. v. Vicksburg, S. & P. R. Co.* 193.

13. Defendants publish a certain rate on lumber from stations upon their lines, which must be strictly observed and charged to all shippers alike; and they are not entitled, under the Act to Regulate Commerce, to grant a division of the rate to the owner of a lumber mill as compensation to him for the cost of bringing his logs to the mill by steam railroad, horse railroad, wagon, or any other means of conveyance. *Id.*

14. While an association of shippers has no direct interest in a determination of the question as to whether divisions or allowances from published tariff rates, made by defendants to tap lines owned or controlled by other shippers, constitute departures from the published rates, it has such an indirect interest as entitles it under the statute to maintain a proceeding to have such division declared unlawful. *Id.*

15. The act of February 19, 1903 (the so-called "Elkins law"), which applies both to the carrier and the party receiving the concession, has been systematically and continuously violated by the Atchison, Topeka & Santa Fé Railway Company, and the Colorado Fuel & Iron Company from the day of its passage down to November 27, 1904, when the tariffs upon which coal moved were reduced in all cases \$1.15. *Re Transportation of Coal & Mine Supplies*, 473.

16. The Atchison, Topeka & Santa Fé Railway Company violated the Act to Regulate Commerce, which requires carriers to punish and adhere to their tariffs, by publishing rates on interstate shipments of coal from mines in Colorado and New Mexico, which, under the tariffs, applied only to the transportation thereof, but which for the Colorado Fuel & Iron Company were made by the railway company to include the price of the coal, and such price was paid by the fuel and iron company to the railroad company. *Id.*

17. Storage rates and regulations enforced by common carriers subject to the Act to Regulate Commerce must be published at their stations and filed with the Commission. *Blackman v. Southern R. Co.* 352.

SCHOOL SLATES.

Rates on. *Chamber of Commerce of Chattanooga v. Southern R. Co.* 118.

SCREEN FRAMES.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

SCROLL WORK.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

SHELVES.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

SHINGLES.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

SHUTTERS, INSIDE AND OUTSIDE.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

SLATES.

Rates on. *Chamber of Commerce of Chattanooga v. Southern R. Co.* 118.

SLEIGH WOOD.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

SNAPPED CORN.

Rates on. *H. B. Pitts & Son v. St. Louis & S. F. R. Co.* 684.

SPINDLES.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

SPOKES.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

SPOOLS FOR BARB WIRE.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

STAIR WORK.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

STAVES.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

STEEL AND IRON RAILS.

Table showing total annual freight tonnage of steel and iron rails and other commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 534.

Tift v. Southern R. Co. 568.

STOCK YARDS.

1. It is not an unlawful discrimination between commodities, for the defendant railroad company to deliver carloads of dead freight to the Southern Railway for consignees in Louisville, and to refuse to deliver live stock to the same railway at Louisville consigned to a particular stock yards, where the defendant railroad company is under a contract with a

competing stock yards company to deliver all live stock to such company, *Railroad Commission of Kentucky v. Louisville & N. R. Co.* 173.

2. Section seven of the Act to Regulate Commerce is not violated by a railroad company in making and carrying out an exclusive contract with a stock yards company for the exclusive delivery to that company of live stock in the city of Louisville, although in carrying out such contract it refuses to deliver to another railroad company for delivery to a competing stock yards, live stock consigned to such competing stock yards. *Id.*

3. A railroad company does not violate the Act to Regulate Commerce by making and carrying out an exclusive contract with a stock yards company, by which it delivers all live stock transported by it to the yards of such stock company. *Id.*

STORAGE.

1. Storage rates and regulations enforced by common carriers subject to the Act to Regulate Commerce must be published at their stations and filed with the Commission. *Blackman v. Southern R. Co.* 352.

2. The Southern Railway Company in applying to complainants' interstate traffic at Macon, Ga., the storage rates prescribed by the Georgia Railroad Commission, and the Columbia, Newberry & Laurens Railroad Company in applying to complainants' interstate traffic at Columbia, S. C., the storage rates prescribed by the South Carolina Railroad Commission, did not violate the Act to Regulate Commerce, although such storage rates were in excess of the usual public warehouse charges in Macon and Columbia. *Id.*

3. A railroad freight depot and a public storage warehouse are not used for similar purposes, and the charge for storage in the railroad depot may properly be made higher than the public warehouse charge, with the object of compelling the expeditious removal of freight. *Id.*

STORE FRONTS, WOODEN.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

SUGAR.

Rates on. *Lehman-Higginson Grocery Co. v. Atchison, T. & S. F. R. Co.* 460.

Blackman v. Southern R. Co. 352.

SUPREME COURT.

Estoppel by Decision of, see JUDGMENT.

SWITCH.

No such undue preference or unjust discrimination as would warrant an order of relief or for reparation is shown under complainant's claim that he was subjected to an unreasonable disadvantage by refusing him a private switch and providing his competitor in the coal business with one, thereby compelling him to unload coal at an inconvenient point near the outskirts of the town, where it appeared that complainant really desired

to use a passing siding of defendant for the purpose of unloading his coal. *Parks v. Cincinnati & M. Valley R. Co.* 47.

TARIFFS. See SCHEDULES OR TARIFFS.

TELEGRAPH POLES.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

TELEPHONE POLES.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

TERMINAL CHARGE.

In proceedings to determine the reasonableness of a through rate as augmented by an alleged unlawful terminal charge, all the carriers participating in the through rate are proper parties, but not necessary parties, as the only necessary parties defendant are the carriers who retain the terminal charge for their own use. *Cattle Raisers' Asso. v. Chicago, B. & Q. R. Co.* 83.

Proceedings for Reparation for Illegal Terminal Charge, see REPARATION.

TERMINAL RAILROADS.

See also heading *Through Rates*, under title RATES.

Excessive Division of Through Rate in Favor of Carrier Owned and Controlled by Shipper, as Constituting a Rebate, see REBATES.

THROUGH RATES.

See heading *Through Rates*, under title RATES.

THROUGH ROUTE.

1. While defendant carrier was entitled to insist upon the application of the through rate to the through shipment on its line to Hope, Ark., instead of applying the sum of local rates based upon Texarkana, Ark., which sum was less than the published through charge, it could not lawfully refuse to receive and carry complainant's freight to Texarkana under the local rate to that point, even though the complainant's attempt to ship its freight to Texarkana was for the purpose of having it subsequently re-shipped from that point by another line to Hope, Ark. *Hope Cotton Oil Co. v. Texas & P. R. Co.* 696.

2. Defendants are unlawfully engaged in pooling the traffic in citrus-fruits originating in southern California and carried by them and their connections to eastern markets, but further action upon this branch of the proceeding is reserved by the Commission, in view of the pendency in the United States Supreme Court of an appeal from a like decision of the circuit court for the southern district of California, in a suit brought by this Commission, to enforce its order herein prohibiting the defendants from continuing to apply and enforce a provision in their tariff reserving

to themselves the routing of this traffic to eastern destinations, and depriving the shippers of their right to determine which of various established routes shall be used for the transportation of their property. *Consolidated Forwarding Co. v. Southern P. Co.* 590.

TOBACCO.

Table showing comparison of total annual tonnage of tobacco with that of other commodities. *Tift v. Southern R. Co.* 568.

VALUATION.

The regulation by a carrier whereby the freight rate on perishable fruit is increased in proportion to the carload valuation fixed by the shipper is unreasonable and unjust. *Georgia Peach Growers' Asso. v. Atlantic Coast Line R. Co.* 255.

WAGONS AND CARRIAGES.

Table showing comparison of total annual tonnage of wagons and carriages with that of other commodities. *Tift v. Southern R. Co.* 568.

WAGON WOOD.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

WAINSCOTING.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

WALNUT LUMBER.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

WAREHOUSE.

1. Storage rates and regulations enforced by common carriers subject to the Act to Regulate Commerce must be published at their stations and filed with the Commission. *Blackman v. Southern R. Co.* 352.

2. The Southern Railway Company in applying to complainants' interstate traffic at Macon, Ga., the storage rates prescribed by the Georgia Railroad Commission, and the Columbia, Newberry & Laurens Railroad Company in applying to complainants' interstate traffic at Columbia, S. C., the storage rates prescribed by the South Carolina Railroad Commission, did not violate the Act to Regulate Commerce, although such storage rates were in excess of the usual public warehouse charges in Macon and Columbia. *Id.*

3. A railroad freight depot and a public storage warehouse are not used for similar purposes, and the charge for storage in the railroad depot may properly be made higher than the public warehouse charge, with the object of compelling the expeditious removal of freight. *Id.*

WATER COMPETITION.

An undue discrimination is made by the defendants in fixing their rates

for transporting lumber to points on the New York & Long Branch Railroad by adding to the rate to New York city an arbitrary charge of 5 cents per 100 lbs. when the shipping point is Saginaw, Mich., but only 2 cents per 100 lbs. when the shipping point is Buffalo, N. Y. Water competition between Buffalo and New York affects the rates to New York, but it justifies no wider difference in the rates from Saginaw and Buffalo to these interior destinations than exists in the rates from these shipping points to New York. *Mershon S. P. & Co. v. Central R. Co.* 456.

WHEAT.

Rates on. *Aberdeen Group Commercial Asso. v. Mobile & O. R. Co.* 239.
Cannon Falls Farmers' Elevator Co. v. Chicago G. W. R. Co. 650.
Wichita v. Missouri P. R. Co. 35.

WINDOW FRAMES.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 439.

WINDOW GLASS.

Table showing car capacity and actual loading capacity when loaded with window glass as compared with other commodities. *Central Yellow Pine Asso. v. Illinois C. R. Co.* 533.
Tift v. Southern R. Co. 577.

WINDOW SCREENS.

Rates on. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 439.

WINDOW STOCK.

Freight classification of. *Duluth Shingle Co. v. Duluth, S. S. & A. R. Co.* 489.

WINES, LIQUORS, AND BEERS.

Table showing comparison of total annual tonnage of wines, liquors, and beers with that of other commodities. *Tift v. Southern R. Co.* 568.

